THE

LAW JOURNAL REPORTS

FOR

THE YEAR 1885:

COMPRISING

REPORTS OF CASES

IN

The House of Lords and in the Privy Council,

IN

The Court of Appeal, the Court for Crown Cases Reserved and the Court of Bankruptcy;

AND IN

THE HIGH COURT OF JUSTICE

VIZ.

Chancery; Queen's Bench; and Probate Divorce and Admiralty, Divisions.

MICHAELMAS 1884 TO MICHAELMAS 1885.

The Appellate Cases, in the House of Lords, and in the Court of Appeal, are with the Reports of Cases in the respective Divisions and Courts from which the Appeals come. These Cases form five distinct Volumes, having separate Indexes of Subjects and Tables of Cases: viz., the Privy Council Volume; the Chancery Volume; the Queen's Bench or Common Law Volume, including Bankruptcy; the Probate, Divorce, and Admiralty Volume; and the Magistrates' Cases.

THE CASES RELATING TO THE POOR LAW, THE CRIMINAL LAW, AND OTHER SUBJECTS CHIEFLY CONNECTED WITH THE DUTIES AND OFFICE OF MAGISTRATES, ARE SEPARATELY ARRANGED, AND FORM A DISTINCT VOLUME OF REPORTS, VIZ. THE MAGISTRATES' CASES.

THE PRIVY COUNCIL CASES HAVE THEIR OWN INDEX AND TABLE OF CASES, AND FORM A DISTINCT VOLUME OF REPORTS.

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[CONTEMPORARY WITH LAW REP. 14 AND 15 Q.B. D.; 10 APP. CAS.]

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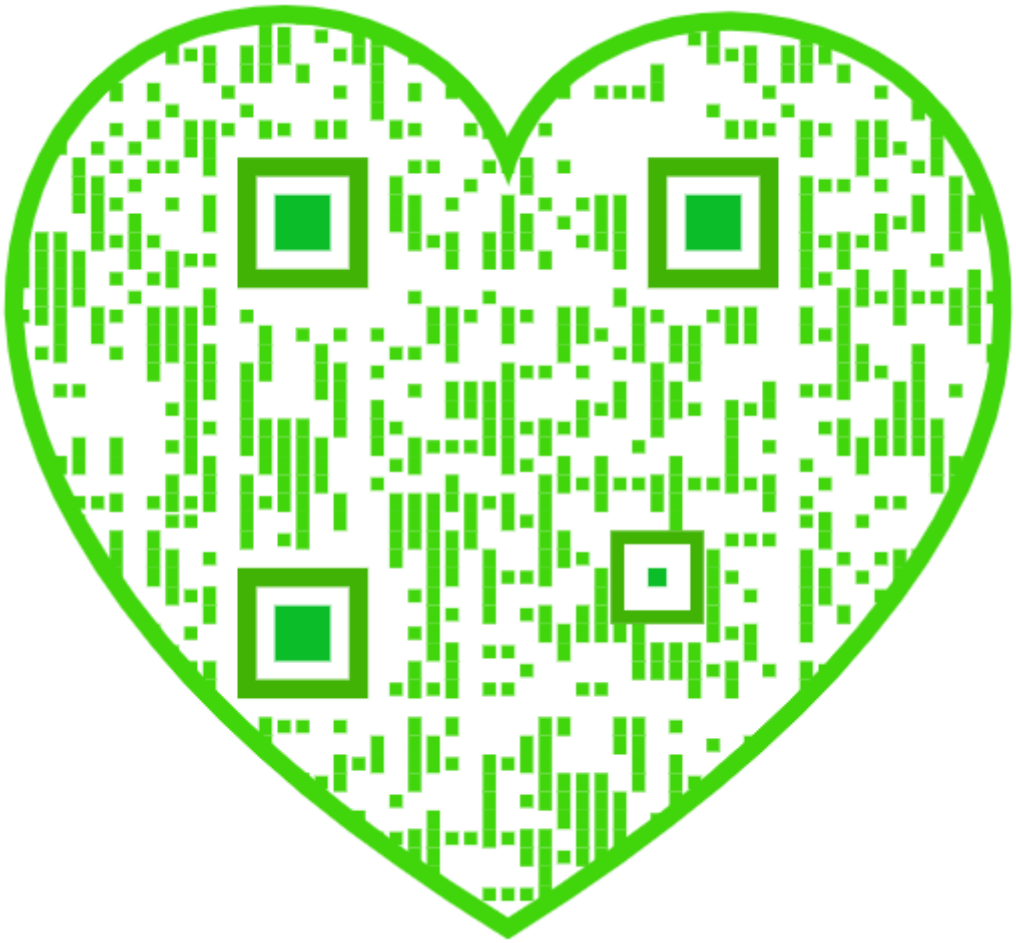

CASES

ARGUED AND DETERMINED

IN THE

Queen's Bench Division

OF THE

HIGH COURT OF JUSTICE,

REPORTED BY

W. DECIMUS I. FOULKES, J. H. ETHERINGTON SMITH,
GILBERT GEORGE KENNEDY, RICHARD HOLMDEN AMPHLETT,
FRANCIS PARKER, EDWARD BENNETT CALVERT,
AND GEORGE HUMPHREYS,
BARRISTERS-AT-LAW;

AND ON APPEAL THEREFROM

IN

Her Majesty's Court of Appeal,

REPORTED BY

ARTHUR CLEMENT EDDIS, ROBERT BRUCE RUSSELL,
WILLIAM EDWARD GORDON, GEORGE ABBOTT STREETEN,
AND EDWARD NASH,
BARRISTERS-AT-LAW,

AND IN

The House of Lords,

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SUPREME COURT OF JUDICATURE.

CASES ARGUED AND DETERMINED

IN

The Queen's Bench Division

OF

THE HIGH COURT OF JUSTICE

AND ON APPEAL THEREFROM

IN THE

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MICHAELMAS 1884 TO MICHAELMAS 1885.

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[IN THE COURT OF APPEAL.]

1884. Oct. 31. } JOSEPH *v.* LYONS.*

Bill of Sale—After-acquired Property—Pledge—Legal Title—Equitable Title—Judicature Act, 1873, *s.* 25, *sub-s.* 11.

A pledgee of goods, which are subject to an assignment as after-acquired property under a bill of sale, who has no notice of the bill of sale, has a good title against the bill of sale holder.

A bill of sale assigning property to be afterwards acquired confers only an equitable title on the grantee, which gives way to a legal title acquired without notice of the bill of sale.

Appeal against the decision of Huddleston, B., upon further consideration, after the trial of the action at Gloucester without a jury, whereby judgment was entered for the plaintiff for 171*l.* 10*s.*, to be reduced to 1*s.* on the return of the goods in question.

The goods for the detention of which the action was brought consisted of certain jewellery, which previously to the 17th of September, 1883, were part of the stock-in-trade of one Manning, a jeweller, in his shop, No. 64 High Street, Worcester.

On the 3rd of February, 1881, a bill of sale was given by Manning to the plaintiff to secure the balance of the purchase-money on the sale of the business at 64 High Street. By that bill of sale Manning assigned to the plaintiff the goodwill in the business, also "all and singular the stock-in-trade, fixtures, and trade-fittings, plate, linen, china, chattels, and other effects and things in or about or belonging to the said shop, dwelling-house, and premises," and also "all the stock-in-trade, trade fixtures, and fittings, goods, chattels, and effects, which shall or may at any time or times during the continuance of this security be brought into the aforesaid shop, messuage, or dwelling-house and premises, or be appropriated to the use thereof, either in addition to or substitution for the stock-in-trade, trade fixtures and fittings, goods, chattels, and effects now being thereon or belonging thereto, or any of them." It was further provided by the bill of sale that, until default in the payments to be made, Manning was to retain possession of the chattels and premises, and that "all future property expressed to be assigned should be subject to the security thereby made, although the same or any part thereof might not be capable of passing at law by the assignment; and the expression

* *Coram* Brett, M.R., Cotton, L.J., and Lindley, L.J.

'chattels and premises' should in all cases extend to and include such future property." The bill of sale was duly registered.

On the 17th of September, 1883, Manning pledged the jewellery in question with the defendants in consideration of an advance of 70*l.* The jewellery was not in the shop or on the premises at 64 High Street on the 3rd of February, 1881, but was purchased by Manning subsequently, and brought into the shop in the course of carrying on the business. The defendant had no knowledge of the bill of sale.

After the argument on further consideration, judgment was given by Huddleston, B., who, after disposing of certain other questions in the action in favour of the plaintiff, continued as follows:—

"At common law after-acquired property would not pass so as to entitle the plaintiff to recover either in trover or detinue—*Lunn* v. *Thornton* (1); but in equity a different rule prevails, and a contract for the sale of chattels to be afterwards acquired transfers the beneficial interest in the chattels as soon as they are acquired to the grantee. The passage in *Benjamin on Sales*, 2nd ed. p. 65, the cases of *Holroyd* v. *Marshall* (2), *Clements* v. *Matthews* (3), and *Belding* v. *Read* (4) were fully discussed, and Mr. Jelf drew some ingenious distinctions as to the equitable positions of the plaintiff and defendant; but I think I am bound by those cases, and by the judgment of the Court of Queen's Bench in *Leatham* v. *Amor* (5), and the decision of my brother Lopes in *Lazarus* v. *Andrade* (6), in which cases *Belding* v. *Read* (4) is fully explained. In *Collyer* v. *Isaacs* (7) the late Master of the Rolls says, 'A man can contract to assign property which is to come into existence in the future; and when it has come into existence, equity, treating as done that which ought to be done, fastens upon that property, and the contract to assign thus becomes a complete assignment.' The goods here became specific on being brought on the premises, as pointed out in the case of *Clements* v. *Matthews* (3). The plaintiff, therefore, is entitled to a verdict, and judgment for 171*l.* 10*s.*, to be reduced to 1*s.* on the property being given up to the plaintiff, with costs to the plaintiff."

Jelf, *Q.C.*, and *W. H. Clay*, for the appellant.—The defendant is pledgee of the goods, with a legal title, and without notice of the plaintiff's equitable interest, and therefore his title prevails over the plaintiff's. A legal interest in the after-acquired property was not passed by the bill of sale, but only an equitable interest. There was no *novus actus interveniens* on the part of the plaintiff to turn his equitable interest into a legal interest.

They cited *Lunn* v. *Thornton* (1), *Holroyd* v. *Marshall* (2), *Clements* v. *Matthews* (3), and *Reeves* v. *Barlow* (8).

A. T. Lawrence and *Darling*, for the respondent.—The rules applicable to a contract of sale apply. When a vendor agrees to sell a non-existent thing, and the purchaser agrees to buy it, the property passes as soon as the thing is ascertained. The property passed in this case to the plaintiff as soon as the jewels came into the shop.

[COTTON, L.J.—If that be so, when a present assignment purports to take place, does not the argument go too far and shew that at common law there might be an assignment of non-existing things?]

The opinion of Jessel, M.R., in *Collyer* v. *Isaacs* (7), as cited by Huddleston, B., is in the plaintiff's favour. The Judicature Act, 1873, s. 25, sub-s. 11, gives the plaintiff a title for all purposes, as he had an equitable title previously. The defendant should have made enquiry, in which case he would have discovered that a bill of sale was registered against Manning.

BRETT, M.R.—In this case the plaintiff brought an action of trover or detinue to

(1) 1 Com. B. Rep. 379; 14 Law J. Rep. C.P. 161.
(2) 10 H. L. Cas. 191; 23 Law J. Rep. Chanc. 193.
(3) 52 Law J. Rep. Q.B. 772; Law Rep. 11 Q.B. D. 808.
(4) 3 Hurl. & C. 955; 34 Law J. Rep. Exch. 212.
(5) 47 Law J. Rep. Q.B. 581.
(6) 49 Law J. Rep. C.P. 847; Law Rep. 5 C.P. D. 318.
(7) 51 Law J. Rep. Chanc. 14; Law Rep. 19 Ch. D. 343.
(8) 53 Law J. Rep. Q.B. 192.

recover certain jewellery. The plaintiff is holder of a bill of sale, the grantor of which was one Manning. Manning pledged the jewellery in question with the defendant in the ordinary way. There is no pretence for saying that the defendant knew anything about the jewellery, except that it was offered him in pledge in the usual way. Can the plaintiff maintain the action? The bill of sale is itself an acknowledgment that the business was Manning's. There was an existing stock-in-trade which was passed to the plaintiff, but the business remained Manning's, and he was left to sell the stock on his own account, the plaintiff taking the security of this bill of sale. By the bill of sale, not only the existing stock, but in the ordinary form any stock which might come on Manning's premises was assigned. The goods in question were not in Manning's possession at the time of the assignment. They were after-acquired property. It is argued for the plaintiff that he had the legal property; for the defendant, that the plaintiff only had an equitable interest in the property. Which is correct? It was ingeniously argued that the bill of sale was equivalent to a contract by Manning that the after-acquired goods should become the legal property of the plaintiff on their being acquired. The transaction was likened to the purchase and sale of future goods which became the property of the buyer on the ascertainment of the goods by the seller. The argument is ingenious; but is it law? For a long series of years it has been held that when a bill of sale assigns after-acquired property on certain premises, it does not pass the legal property in the goods even when they come on the premises. The Courts of equity have decided that this is not a legal interest, but an equitable interest. The reason, I think, is that the document purports to pass the property at the time of the making of the bill of sale; but the law said "you cannot do so." In equity it was held that an equitable interest was given. The document did not contain a contract to pass the property in the goods when they came on the premises, and the law says, "If you enter into such a document as this you have an equitable interest." Can it be said that there was a contract to pass the property in the goods? There never was such an intention. The parties must be taken to have contracted for an equitable and not a legal interest. Equity considered that what was done was equivalent to a contract that when the goods came on the premises they should pass. The language of the late Master of the Rolls in *Collyer* v. *Isaacs* (7) is exceedingly plain. He says, "A man cannot in equity any more than at law assign what has no existence. A man can contract to assign property which is to come into existence in the future; and when it has come into existence, equity, treating as done that which ought to be done, fastens upon that property, and the contract to assign thus becomes a complete assignment." That means a complete assignment in equity, but not at law, and the passage is not to be read by an astute process making it ungrammatical. Where was the legal interest in these goods? Not in the trader who sold to Manning; it was in Manning himself. He deposited them by way of pledge, and the right in a pledge is a legal right. The right of the defendant is legal: the right of the plaintiff is equitable. It was suggested that the defendant might have enquired whether Manning had a bill of sale registered against him; but that was a far-fetched argument. He was not obliged to enquire unless some fact putting him on enquiry was brought to his notice. We must therefore differ from the opinion of Baron Huddleston, and enter judgment for the defendant.

COTTON, L.J.—At the time when the defendant took the goods in pledge the plaintiff had a bill of sale over property then in this shop and over after-acquired property. The question is in regard to this latter class of property. Did the plaintiff acquire at law any property? That he did not was established in *Holroyd* v. *Marshall* (2), a case in which those trained in the common law Courts had some difficulty in bringing themselves to hold that the plaintiff acquired any right at all. It was laid down that in law an assignment of after-acquired property was of no effect, it was null and void. Equity treated it as a contract afterwards carried out. In *Lunn* v. *Thornton* (1)

the same thing happened as in this case. It was said that the Judicature Acts swept away all this distinction. But the effect of the Judicature Acts was only to give effect to equitable rights when they ought to prevail, and to legal rights when they ought to prevail. The meaning of the sub-section giving general prevalence to equity is illustrated by the sub-section preceding as to the custody of infants. It was not intended to alter the effect of assignments, and to say that an inoperative assignment void at common law was operative. I have already stated this in *Clements* v. *Matthews* (3), in order that the idea might not hereafter avail. The bill of sale gives the assignee only an equitable title in these goods. It is said that the bill of sale amounts to a contract that the goods should be assigned. But the common law says that it is void, and the rule that goods contracted to be sold became the property of the vendee on ascertainment does not apply when there purports to be a present assignment. The plaintiff, therefore, had only an equitable title, and the defendant had the legal title. Equity does not deprive of the legal title unless there is an equity against the holder of it. There is nothing to shew that the defendant had any notice of the plaintiff's contract. It is said that he ought to have enquired, and he would have discovered the existence of the bill of sale. But there was nothing to suggest that there was a bill of sale, unless every pawnbroker is bound to assume that every borrower has a bill of sale. This would be carrying constructive notice to an absurd extent. Baron Huddleston relied on *Lazarus* v. *Andrade* (6). That decision was right, because the execution creditor does not stand in the same position as the defendant here; but, so far as Baron Huddleston relied on the opinion of Mr. Justice Lopes in that case, I think Mr. Justice Lopes was wrong.

LINDLEY, L.J.—The plaintiff can only succeed if he has a legal title, or if he has an equitable title of which defendant had notice. I cannot see how he has a legal title. There is a clause in the bill of sale shewing that the parties knew the effect of this deed. It is plain that was the effect from *Lunn* v. *Thornton* (1) and *Holroyd* v. *Marshall* (2). The Judicature Act, it is said, turns equitable into legal titles. If that were so, there would be no more trustees, and all trust property would be thrown into confusion. As to the plaintiff's equitable title, was there notice of it? If there was in this case, there is an end to dealings between man and man and commercial transactions. There was no actual notice and no constructive notice.

Judgment reversed.

Solicitors—C. C. Ellis, Munday & Co., agents for W. Lambert, Great Malvern, for plaintiff; D. W. Pearse, agent for R. Jeffery Parr, Birmingham, for defendant.

[IN THE COURT OF APPEAL.]

1884. Nov. 15. } LAST *v.* THE LONDON ASSURANCE CORPORATION.*

Revenue—Income Tax—Life Assurance—Bonuses—"Gains and Profits"—5 & 6 Vict. c. 35. Schedule D.

Two-thirds of the surplus of receipts over payments in respect of the life policies of an insurance company were by the terms of the policies payable every five years to the policy holders by way of cash payment, reduction of premiums, or addition to the sum assured, the remaining third being payable to the shareholders after deducting the expenses of the business:—Held, *by* BRETT, M.R., *and* COTTON, L.J. (LINDLEY, L.J., *dissentiente*), *that such two-thirds were not "gains and profits" assessable to the income tax.*

Appeal from the decision of the Queen's Bench Division (Day, J.; *dissentiente* Smith, J.), reported 53 Law J. Rep. Q.B. 325, on a Case stated by the Income Tax Commissioners for the City of London. The Case is fully set out in the report of the decision, and the following facts only

* *Coram* Brett, M.R., Cotton, L.J., and Lindley, L.J.

are necessary to be repeated for the purposes of this appeal.

In the life branch of the respondents' business there is a class of policy by the terms of which the surplus which remains after payment of sums assured is dealt with as follows: two-thirds of the surplus are paid to the assured, who receive payment either by way of bonus or by abatement of premium, and the remaining third of the surplus goes to the respondents, who bear the whole of the expense of the business. The portion which remains after payment of expenses constitutes the only profit of the respondents available for division among the shareholders.

The Attorney-General (*Sir H. James, Q.C.*) and *Dicey*, for the Crown.—It is intended to argue only the question whether the two-thirds surplus is taxable as profits. It is submitted that the two-thirds are "gains or profits" within Schedule D (5 & 6 Vict. c. 35). It is part of the excess of the expenditure over receipts—*The Mersey Docks and Harbour Board* v. *Lucas* (1). The bonuses are not a return of excessive premiums, but a share in the profits. What the policy-holders obtain is in proportion to the success of the company. It is the profits indicating the success of the undertaking which the Legislature intended to tax.

Sir Hardinge Giffard, Q.C. (*Charles, Q.C.*, and *A. P. Stone* with him), for the respondents.—The bonuses are expenses, and not profits. They would not have the appearance of profits except that their amount is ascertained with reference to the profits of the company. The case is the same as if a trader were to agree to give his customers so much if he did a flourishing business.

The Attorney-General in reply.

BRETT, M.R.—By the Income Tax Acts those who carry on a trade or business pay the tax upon their profits—that is, the profits on the business which are theirs. They are the people to be taxed. The profits are the ordinary profits in the business sense of the word. As I said in *The Mersey Docks and Harbour Board* v. *Lucas* (2), the profits are "the difference between the receipts and the expenses of earning those receipts." They are the profits of the business to the man who is carrying on the business—the receipts less the expenses to which he is in fact put in order to earn the receipts. There is no question of a hypothetical business. The tax is to be paid on the actual thing. How are the receipts procured? From the people who deal with the man of business, or his customers, as they are commonly called. The expenditure is what he has to expend out of those receipts in order to obtain them. The person who has to be considered is the person carrying on the business as opposed to his customers. The business may be carried on by an individual, a partnership, or a company with shareholders. Where there is a company with shareholders, the company carry on the business in a sense, but the people who really carry on the business are the shareholders. The two opposite sets are the shareholders and the customers. If you speak of the shareholders they are the people carrying on the business, and the customers are the policy-holders and people who have annuities and so on. The customers pay an annual sum in respect of a policy. Those sums are the gross receipts of the company. The company in fact expend, to get that business, the expenses of management. On certain conditions they pay to the customers in each year certain bonuses. Why, in the business sense, is that? Can it be suggested that it is done out of mere benevolence? It is done, not out of affection, but to induce the policy-holder to remain or become a customer. What is paid to get the receipts from customers must be an expenditure. The profits are the annual profits. How are the annual profits arrived at? They are the difference between what is received and what is paid. If the trader has entered into engagements as to what he is to do with that profit, he must fulfil his engagements. If he invest it, or put it to a reserve fund, it is still his. But how can that which you pay back to a customer be part of your profits? The Attorney-General was obliged to say that

(1) 53 Law J. Rep. Q.B. 4; Law Rep. 8 App. Cas. 891.

(2) 51 Law J. Rep. Q.B. 114, at p. 119.

Last v. *London Assurance Corporation, App.*

the policy-holders were partners. But they are also customers, which is a contradiction in terms. What goes to customers is not profit. My brother Lindley has, I think, a difficulty in distinguishing between shareholders and policy-holders. The whole difference lies in the business meaning of the words. What the trader keeps himself is that which is to be taxed; what he pays in order to induce people to be customers is expenditure. These bonuses are in fact paid in order to induce custom.

COTTON, L.J.—The question in this case raises a short and nice point. The House of Lords has decided that even though by statute profits are not the subject of benefit to those that make them, they still are subject to taxation. Are these bonuses "profits" within the meaning of the Acts; or are they to be deducted as expenses? The profits of a business are equivalent to the returns less the sums paid to produce them—as the Master of the Rolls has defined the word. The difficulty arises from the ambiguous use of the word "profits." What are the "gains and profits" in this instance? The expenses of management are not thrown on the two-thirds going to the policy-holders, but on the one-third going to the shareholders. The contract with the policy-holders is that if after paying certain expenses there remains a surplus, they shall have a proportion of it. That increases the number of customers. The money is paid in fact for the purpose of securing larger returns. The policy-holders are entitled to the bonuses, not as shareholders, but as customers.

LINDLEY, L.J.—I am unable to take the same view of this case. I do not think that these bonuses are expenditure. I agree, of course, that they draw custom, but on looking to the Acts I do not agree that we must draw a distinction between the profits according to the persons who receive them. The excess of the expenditure over the receipts is to be taxed. Of this excess one-third goes to the shareholders in virtue of their shares, and the two-thirds to the policy-holders in virtue of their contracts. I do not think the destination makes the excess less "profits." I need not add more, except that I agree generally with the reasons given in the Court below by Mr. Justice Smith. As, however, the majority of the Court are of a contrary opinion, the appeal must be dismissed.

Appeal dismissed.

Solicitors—The Solicitor to the Inland Revenue, for the Crown; Collyer-Bristow & Co., for respondents.

[IN THE HOUSE OF LORDS.]

1884. July 10, 11. August 4. } SWINBURNE *v.* MILBURN AND OTHERS.

Lessor and Lessee — Covenant — Perpetual Renewal—Burden of Proof.

A lessor demised to a lessee certain hereditaments for three lives. The lease contained a covenant that the lessor, his heirs and assigns, upon the lessee, his heirs or assigns, "surrendering this present demise," would at any time thereafter at the request of the lessee, his heirs or assigns, as often as one or two life or lives of and in the hereditaments granted should "drop and be determined, renew, fill up, and grant a further term of and in the said premises, for any other life or two lives of any other person or persons to be nominated by" the lessee, his heirs or assigns, in the place of the life or lives so dropping or determining: the lessee, his heirs or assigns, paying to the lessor, his heirs or assigns, for every such renewal "for every life or lives of such person or persons so to be renewed as aforesaid, the sum of forty shillings only, and at the same time surrendering or delivering up this present demise to be cancelled":— Held, *that this was not a covenant for perpetual renewal, but for renewals for three fresh lives only, with an option as to the times and mode of taking such renewals, the lessee being at liberty—first, to take three renewals of one life each on the dropping of each successive original life; or, secondly, to take a renewal for two lives on the dropping of the second, and a renewal for one life on the*

dropping of the third original life; or, thirdly, to take a renewal for one life on the dropping of the first, and a renewal for two lives on the dropping of the third original life.

There is no legal presumption against a right of perpetual renewal, but the burden of proof is on any one claiming such a right, which will not be inferred from equivocal expressions fairly capable of another construction.

The plaintiff appealed from the judgment of the Court of Appeal (reported 53 Law J. Rep. Q.B. 226) upon the following Special Case :—

1. By an indenture of lease bearing date the 24th of March, 1827, for the considerations therein mentioned, Sir John Edward Swinburne, Baronet (since deceased), granted and demised to William Goodfellow, his heirs and assigns, one-fifth part of an acre of ground, together with the messuages and other buildings then or thereafter to be erected and built thereon: Together also with all and singular the appurtenances to the said messuage and premises belonging at Stamfordham, otherwise Stannerton, in the county of Northumberland, then in the possession of Hector Goodfellow, and more particularly and fully described in the said indenture of lease, for and during the natural lives of William Goodfellow, William Robson Scott, and Joseph Jordan, and for and during the natural life of each and every of them longest living, at and for the yearly rent of four shillings, payable as therein mentioned.

2. In the said indenture was contained a covenant on the part of the said lessor, which was in the words following :—"And also that the said Sir John Edward Swinburne, his heirs and assigns (upon the said William Goodfellow, his heirs or assigns, surrendering this present demise as hereinafter mentioned), shall and will at any time hereafter, at the request, costs, and charges of the said William Goodfellow, his heirs or assigns, within the space of three calendar months after such request, as often as one or two life or lives of and in the said tenements, hereditaments, and premises, with the appurtenances, shall drop and be determined, renew, fill up, and grant a further term of and in the said premises for any other life or two lives of any other person or persons to be nominated by him the said William Goodfellow, his heirs or assigns, in the stead, place, and room of the persons, life or lives so dropping or determining, he the said William Goodfellow, his heirs or assigns, paying unto the said Sir John Edward Swinburne, his heirs or assigns, for every such renewal, filling up, or granting such further term for every life or lives of such person or persons so to be renewed as aforesaid, the sum of forty shillings only, and at the same time surrendering or delivering up this present demise to be cancelled."

3. Either party is to be at liberty to refer to the said indenture of lease as part of this Case.

4. The questions for the opinion of the Court are—first, whether the lessee's right of renewals was limited to two new lives in place of two of those named in the lease, or extended to and included renewals whenever and so often as any life or two lives of and in the premises should drop and be determined—or, in other words, is the covenant to be construed as one for perpetual renewal? Secondly, whether upon a renewal the lessees would be entitled to have inserted in a new lease a covenant for renewal similar to the covenant above set forth.

The Queen's Bench Division held that the covenant was for a single renewal only of one or two lives. The Court of Appeal decided that it conferred a right of perpetual renewal.

Davey, *Q.C.* (*R. S. Wright* with him), for the appellant.—The words "upon . . . . surrendering this present demise" govern the whole, and shew the intention to be that there should be the right to renew once, the lessee having the option of renewing on the dropping either of the first or of the second life. Those words are unmeaning if there is a perpetual right of renewal, and are so treated by the Court of Appeal. But unless the intention to give a perpetual right is perfectly clear, the presumption is against it—*Moore* v. *Foley* (1), *Harnett* v. *Yeilding* (2), *Baym-*

(1) 6 Ves. 232, 237.
(2) 2 Sch. & Lef. 549, 555, 557.

ham v. *Guy's Hospital* (3), and *Brown* v. *Tighe* (4). Here the other terms are consistent with an intention to grant one renewal only. If they would be more naturally construed as granting a perpetual right, that is not enough, and due weight should be given to the words which are inconsistent with such construction. "As often as" may be read "at any time whenever." "For every such renewal" means "for a renewal either on one or two lives dropping"; or it may mean "for every life so to be renewed"—that is, 40*s.* on a renewal for one life, and 80*s.* on a renewal for two lives. There are here no words of perpetuity, such as "for ever" "and so on for ever," "at all times hereafter," which might be expected if a perpetual right was intended. There is no case where a perpetual right has been allowed without words of perpetuity, or, as in *Hare* v. *Burgess* (5), a provision that the renewed lease should contain "this present covenant." In *Furnival* v. *Crew* (6) Lord Hardwicke held that a covenant that the renewed lease should contain like covenants was sufficient; but since *Iggulden* v. *May* (7) it has been settled that "like covenants" would not include the covenant for renewal. In *Walmesley* v. *Pilkington* (8) there were the words "and so on continuing the term and estate hereby demised," yet it was held that there was no perpetual right. In *The Copper Mining Company* v. *Beach* (9) there were words of perpetuity. Even omitting the words referring to the surrender of "this present demise" *prima facie* the clause does not import a perpetuity. It would naturally bear a meaning which was not suggested or noticed in the Courts below, that one new life might be added on each successive dropping of the three original lives, or, at the option of the lessee, two on the dropping of the first two, and one on the dropping of the third, or one on the dropping of the first, and two more on the dropping of the other two—see the construction adopted in *Moore* v. *Foley* (1). This would give five possible modes of exercising the right of renewal. The words "as often as," and "upon every such renewal," would be as well satisfied by a plurality of renewals as by a perpetual right—*Baynham* v. *Guy's Hospital* (3) and *Doe* v. *Hardwicke* (10). Another possible and literal construction is that one or two lives might be put in on the dropping of one life, and the same on the dropping of two lives. The fact that this is a renewed lease cannot be regarded; it must be treated for purposes of construction as an original lease—*Kenay* v. *Foode* (11).

W. Barber, *Q.C.* (*Pollard* and *F. J. Church* with him), for the respondents.—There is no presumption of law against perpetual renewal, but merely a leaning (stronger formerly than now) of the Courts in construing covenants—1 *Platt on Leases*, 707, judgment of Smith, B., in *Brown* v. *Tighe* (4). There are words of perpetuity, "at any time hereafter," and words inconsistent with an intention to give only one renewal, "as often as," "for every such renewal." The alternative suggested, which would give three renewals, is an unnatural interpretation of the clause, and is inconsistent with the words on which the appellant relies, referring to the surrender of "this present demise." There were no words of perpetuity in *Furnival* v. *Crew* (6). In *Baynham* v. *Guy's Hospital* (3) there was a proviso shewing that the right to renew was limited to the lives named—see Lord St. Leonards in *Sadlier* v. *Biggs* (12). The respondents strongly rely on *Hare* v. *Burgess* (5), the reasoning in which was considered and adopted with full approval in *Roberts* v. *Mayne* (13) and *Ex parte Clarke* (14). The words "this present demise" must be moulded to suit the context, and should probably be read "*the* present," or existing, "demise," that is, the demise for the time being in existence.

(3) 3 Ves. 295, 298.
(4) 2 Cl. & F. 396; 8 Bli. N.S. 272.
(5) 4 Kay & J. 45; 27 Law J. Rep. Chanc. 86.
(6) 3 Atk. 83.
(7) 9 Ves. 325; 7 East, 237; 2 B. & P. New Rep. 449.
(8) 35 Beav. 362.
(9) 13 Beav. 478.
(10) 10 East, 549.
(11) Batty, 534.
(12) 4 H.L. Cas. 435, 469.
(13) 7 Ir. Chanc. 551.
(14) 6 Ir. Rep. Eq. 51.

Davey, in reply.—In *Sadlier* v. *Biggs* (12) there were words of perpetuity, "for ever," and Lord St. Leonards went expressly upon them. *Roberts* v. *Mayne* (13) followed *Sadlier* v. *Biggs* (12).

Cur. adv. vult.

THE LORD CHANCELLOR (EARL OF SELBORNE) (on Aug. 4).—The Court of Appeal in this case has held that the lease of the 24th of March, 1827, contains a covenant for perpetual renewal. The Divisional Court held it to be for one renewal only. The action was determined upon a Special Case, the questions submitted by which were stated as if no intermediate construction were possible; and the arguments in both the Courts below appear to have proceeded upon that footing. But there is, nevertheless, an intermediate construction open—namely, that the covenant was for as many renewals, either of one life only or of two lives at a time, as might be requested by the lessee upon the falling of each, or any two, of the three lives named in the indenture of the 24th of March, 1827. This construction appears to me to be less open to objection, and better to satisfy the terms of the covenant, than that adopted in either of the Courts below.

The lease of 1827 was made to William Goodfellow for and during the natural lives of himself (inaccurately described as the surviving *cestui que vie* under a former lease then surrendered) and two other persons, named William Scott and Joseph Jordan, and the life of the longest liver of them. [His Lordship then read the covenant set out in paragraph 2 of the Special Case.]

As against a perpetual right of renewal it is to be observed that there is nothing here which, either expressly or by necessary implication, points to perpetuity, if the words "as often as one or two life or lives of and in the said tenements, &c., shall drop and be determined," can be otherwise satisfied; and that there is no provision, as in *Hare* v. *Burgess* (5), that any new lease shall contain a similar covenant for renewal. I am not inclined to adopt the language which is to be found in some authorities, to the effect that there is a sort of legal presumption against a right of perpetual renewal in cases of this kind; but those authorities certainly do impose upon any one claiming such a right the burden of strict proof, and are strongly against inferring it from any equivocal expressions which may fairly be capable of being otherwise interpreted.

Are, then, the words "as often as one or two life or lives of and in the said tenements, &c., shall drop and be determined" fairly capable of being limited to the three lives named in the lease of 1827? I think they are. These are the only lives which, at the date from which the indenture speaks, could properly be described as "lives of and in the said tenements"; and I do not think there is enough to shew that other lives, to be afterwards put in under the covenant by way of renewal, were meant to be included. The words may reasonably be construed in the same way as if they had been "as often as one or two of *the* lives of and in the said tenements," &c., in which case I think they would certainly have had reference to the particular lives named in the lease. This construction (which I adopt) gives full effect to the words "as often as," because it gives a right to three (or, at the option of the lessee, two) successive renewals; and it appears to me to be the construction most consistent with such authorities as *Moore* v. *Foley* (1) and *Doe* v. *Hardwicke* (10).

I am unable, therefore, to assent to the conclusion of the Court of Appeal that this is a covenant for perpetual renewal. But neither can I agree with the Divisional Court that it is a covenant for one renewal only. That construction appears to me to be inconsistent with the plain and natural sense of the words "as often as," which properly signify an event which will recur, at all events, more than once. They cannot, in my opinion, be satisfied by merely giving the lessee an option to take a single renewal after the falling either of one life or of two lives. It does not seem to me consistent with reasonable probability that where the lessee was, at all events, intended to have a right (if he chose) to put in two new lives, provision would be made for his electing to waive that right and to put in only one, which would be the only effect of the alternative if there could be only one renewal.

The Divisional Court appears to have been mainly governed by the consideration that the actual lease of the 24th of March, 1827, could be surrendered only once, which is no doubt true; and it is also true that the surrender which was a condition of renewal was (in terms) to be of "this present demise." But although that demise could only be surrendered on the first renewal, the substance of the condition would be complied with by then surrendering it, and provision would naturally be made in each renewed lease for another surrender, when there was a further renewal. To hold that the form in which this condition is expressed is enough to justify a departure from the natural meaning of the words "as often as" in the lessor's covenant would be, in my opinion, *hærere in cortice*.

I think, for these reasons, that the order appealed from ought to be reversed, except so far as it rescinds the order and sets aside the judgment of the Queen's Bench Division; and that for the declarations therein contained, a declaration should be substituted that the covenant in the lease is for renewal, not perpetually, but as often as any of the three lives for which the lease of the 24th of March, 1827, was granted should drop and be determined, so that any such renewal might take place either on the dropping of any one of the said lives, or after the dropping of any two of them, as the lessee might from time to time request. And, with that declaration, remit the case to the Queen's Bench Division, for that Court to deal with the costs of the action and of the appeal to the Court of Appeal, and to enter up judgment as may be just, on further consideration of the action.

I think there should be no costs of the appeal to this House.

Lord Blackburn. — The question in this case depends entirely on the construction of a covenant, very inartificially and confusedly expressed, contained in a demise under seal made in 1827, whereby the appellant granted to William Goodfellow, "for and during the natural lives of the said William Goodfellow, the surviving *cestui que vie*, William Scott, and Joseph Jordan, for their lives and the life of the longest liver." If the surviving *cestui que vie* is to be read as a description of the Rev. Lambton Lorraine, who, as is mentioned in the recital, was the surviving life of three on which the same property had in 1780 been granted to James Allgood, this is a grant for four lives, one of whom, Lorraine, must in 1827 have been old, and must have long since died. If, as it seems most likely it was, an inaccurate *falsa demonstratio* attached to the name William Goodfellow, it is a grant for three lives only. I do not think it makes any difference on the construction of the covenant whether the demise is for four or three lives.

If there was a covenant to renew in the recited lease, we are not told so. But if there was it was not pursued, as the grant is not for two new lives and the surviving life of the three, but for three new lives either in conjunction with Lorraine or without him. Even, therefore, if *Cooke* v. *Booth* (15) was not distinctly overruled in *Iggulden* v. *May* (7) it could have no application in this case.

The main question is on the true construction of the covenant, and is, I think, whether it is sufficiently shewn by the words used that the agreement was that there should be a perpetual renewal.

The covenant, though clumsily expressed, is, I think, up to a certain extent, clear enough. The lessor covenants that he will, at the request and cost of W. Goodfellow, his heirs or assigns, and within three months after such request, when one life has dropped, on the payment of one fine of 40*s*., grant a further term for the surviving lives, and one new life; or if two lives have dropped, on the payment of 4*l*., grant a further term for the one surviving life and two new ones, the lessee paying the fines and surrendering this present demise. A renewal to that extent at least is I think certainly stipulated for. If all three lives have been suffered to drop, the demise is at an end.

It is implied, I think, though not expressed, that the fresh terms shall, *mutatis mutandis*, be like the present; but that is not enough to express that it shall contain a covenant to renew—*Moore* v. *Foley* (1);

(15) 2 Cowp. 819.

and there are no words of a like effect to those which in *Hare* v. *Burgess* (5) were, I think, rightly held to express that the new lease was to contain a similar covenant to renew.

But I think that it would be sufficient to give a perpetual renewal if the words used in the covenant indicate that the agreement between the parties was that there should be renewals for ever. No technical words are required; nor were there in *Furnival* v. *Crew* (6) express words to that effect, though those which Lord Hardwicke had in that case to construe seem to me to shew such an agreement as strongly as anything short of express words could do. The words "for ever" are not necessary, but it is necessary that the idea should be sufficiently expressed by the words used; and I think if it was agreed that there should be two or three renewals, but not renewals for ever, that would be effectual if sufficiently expressed.

The words of the covenant now in question are that the lessor "will at any time hereafter" grant a renewal as often as one or two life or lives shall drop," and that the tenant shall "for every such renewal" for every life pay 40*s*. These words are certainly not so applicable to a single renewal that must be necessarily made during the existence of one of the three lives once, and once only, and which, though the request may be made on the dropping of any one or any two of the lives, which may happen twice, is not so aptly met by the words "as often as" as it would be by the word "whenever." On the other hand, if a covenant for perpetual renewal was intended, the words "surrendering this present demise" must be moulded to mean, or at least to include, "from time to time surrendering the then existing demise." There is therefore some inconsistency in the expressions used, and when that is the case the Court in construing the instrument has a difficult task; the burthen is on those who seek to mould or alter words actually used.

I think that when one construction would shew that the parties had come to an agreement which, though quite fair and legal, is unusual, and not so likely to be in the minds of the parties as the other, the burthen on those who contend for that construction is considerably increased. And I think it is established by the authorities that, in England at least, a perpetual renewal is, as contrasted with a limited renewal, of that character.

I assent to the criticism on the words used entirely *obiter* by Lord Brougham, when Lord Chancellor, in this House in *Brown* v. *Tighe* (4). He expresses it too strongly; nevertheless, I think that the burthen is increased.

If I could be of the opinion which the two Judges of the Court of Appeal have come to, that the intention of the parties clearly was that there should be a perpetual renewal, I should agree in their conclusion; but I cannot agree in that opinion. The alternative construction which the Lord Chancellor adopts was not thought of by the parties, and I should conjecture does not make any practical difference to them, though it makes the difference of the costs of the appeal. The reasoning of the Lord Chancellor leaves my mind in a state of great hesitation; so great that I do not dissent from the proposed judgment, though I think if it depended on my judgment alone I should prefer to restore the finding of the Divisional Court.

LORD FITZGERALD.—Upon the Special Case the only question which it is actually necessary to determine is whether the covenant in question is to be construed as one for perpetual renewal. The second question was not pressed; and if it had been, there is abundance of authority against the proposition of the defendants which that question imports.

The first question turns altogether on the construction of the covenant in the lease of the 24th of March, 1827, and I do not propose to apply to it any rule of interpretation that would not be applicable to any other covenant or agreement. Mr. Barber, for the respondents, admitted, and I think properly admitted, that the burden lay on him: by which I understood him to mean only that he was bound to shew with reasonable clearness from the language of the covenant, aided by anything to be found in the other parts of the deed, that the parties intended to create a

right of perpetual renewal. If that is once made clear, then the presumption, if any, founded on inconvenience disappears.

The tenure by lease for lives with covenant for perpetual renewal was not usual in this country, but was very common in Ireland, and at one time was said to have affected about a sixth of the whole country. Whatever its origin may have been, it has been recognised by the statute law of Ireland for over two centuries, and there certainly never was in the Courts of that country any presumption against what was commonly known as a lease for lives renewable for ever, and on the contrary it was much favoured. In the numerous cases which arose in Ireland on the construction of covenants alleged to be for perpetual renewal, I have not been able to call to mind a single one in which the covenant was interpreted to be of that character unless it contained sufficient evidence of intention by the use of words importing perpetuity, such as "for ever," or "from time to time for ever hereafter," or some other expressions of a like or equivalent character.

In this country, where the tenure was comparatively unknown and had not been made the subject of any statutable provision, it seems at one time to have been considered that there was some sort of presumption against it; but we can only recognise that to the extent that the party claiming this peculiar perpetual interest has the onus cast on him of shewing with reasonable clearness from the terms of his deed that the covenant he relies on was intended by the parties to be a covenant for perpetual renewal.

The terms of the covenant in question have been so fully criticised by your Lordships that I shall only repeat that there are no words to be found in it sufficiently importing "perpetuity," and we must do violence to some of its provisions before we could put on it the interpretation of "perpetuity," such, for example, as "surrendering this present demise," and "at the same time surrendering or delivering up this present demise to be cancelled."

The argument for the defendants went principally on the words "as often as," which may be otherwise satisfied, and to which full effect has been given by the intermediate interpretation put on the whole covenant by the Lord Chancellor.

I concur in the decision and in the reasons of the Lord Chancellor.

[Order appealed from reversed, except so far as it rescinds the order and sets aside the judgment of the Queen's Bench Division. For the declarations contained in that order the following declaration was substituted, namely, "that the covenant in the lease is for renewal, not perpetually, but as often as any of the three lives for which the lease of the 24th of March, 1827, was granted should drop and be determined; so that any such renewal might take place either on the dropping of any one of the said lives, or after the dropping of any two of them, as the lessee might from time to time request." Cause remitted with that declaration to the Queen's Bench Division for that Court to deal with the costs of the action and of the appeal to the Court of Appeal, and to enter up judgment as may be just, on further consideration.]

Solicitors—Pattison, Wigg & Co., agents for George Armstrong & Sons, Newcastle-on-Tyne, for appellant; J. E. & H. Scott, agents for Bush & Wilson, Newcastle-on-Tyne, for respondents.

1884. Oct. 25. } ALDERTON *v.* ARCHER.

Prohibition — Jurisdiction — Cause of Action — Mayor's Court Act (20 & 21 *Vict.* c. clvii.), *s.* 12.

An agreement for the sale of a lease and the goodwill of a business in Surrey was made orally between the parties. Afterwards the terms so agreed upon were put into writing, the document being drawn up in duplicate. One counterpart was signed by the defendant outside the jurisdiction, and the other subsequently signed by the vendor within the jurisdiction of the Mayor's Court, where the deposit was paid and where the documents were also exchanged. The vendee, having failed to pay 50*l.*, *balance of the purchase-money, was*

sued in the Mayor's Court by the vendor:*— Held, *that, on the signature by the defendant, the plaintiff's cause of action was complete; that no part, therefore, of the cause of action arose within the jurisdiction, and that a writ of prohibition must issue.

This was an appeal from a Judge at chambers against his allowance of a writ of prohibition to the Mayor's Court. The action was to recover 50*l.*, balance of purchase-money for the lease, goodwill, and stock-in-trade of a business at New Cross in Surrey sold by the plaintiff to the defendant. The parties had agreed verbally upon the terms, but afterwards two documents embodying such terms, counterparts of each other, were drawn up. The defendant signed his counterpart at Bow in Middlesex, out of the jurisdiction of the Mayor's Court; the plaintiff subsequently signed his in the city; and the two documents were then exchanged at the plaintiff's solicitor's office, also in the city, and the deposit of 10*l.* paid by the defendant there and then. Before the commencement of the action the plaintiff had duly conveyed the lease and goodwill to the defendant, and the latter had paid a further part of the purchase-money, leaving the balance sued for unpaid. The learned Judge made an order for a writ of prohibition to issue, on the ground that no part of the cause of action arose within the city. The defendant had never resided or carried on business within the city.

The counterpart documents were as follows:—

"An agreement made this 17th of August, 1883, between Anne Cooper Alderton, hereinafter called the vendor, of the one part, and Ellen Archer, hereinafter called the purchaser, of the other part, whereby it is agreed as follows:—

"1. The vendor will sell and the purchaser will purchase the messuage, shop, and premises situate or held under a lease dated the 5th of March, 1866, for the term of twenty-one years from the 25th of December, 1864, at the yearly rent of 25*l.* 10*s.* subject to the covenants and conditions on the lessee's part contained in the said lease, and also the right to a renewal of the said lease granted by and on the terms mentioned in a memorandum dated the 27th of May, 1882, and signed, &c. And also the fixtures, &c., together with the goodwill of the business of a draper carried on at the said premises by G. H.

"2. The purchase-money for the said premises is 126*l.*, whereof 10*l.* is paid on the signing hereof to the vendor's solicitors as a deposit, and the balance, 116*l.*, is to be paid on the 15th of September next when the purchase is to be completed. If the purchase shall not then be completed the purchaser is to pay interest at five per cent. on the unpaid balance of the purchase-money.

"3. The vendor shall within four days from the date hereof deliver to the purchaser an abstract of her title to the said premises.

"4. Possession of the said premises will be given to the purchaser on payment of the balance of the purchase-money, when the vendor and all other necessary parties will execute a proper assurance of the said premises to the purchaser.

"5. If the purchaser shall insist on any objection or requisition which the vendor shall be unable or unwilling to comply with, the vendor may by notice in writing to be given to the purchaser rescind and determine this contract, whereupon it shall become absolutely void, and the vendor will thereupon return to the purchaser the said deposit, but without any interest, costs, or other compensation whatever. As witness, &c."

G. M. Cohen, for the plaintiff.—By section 12 of the Mayor's Court Act, 20 & 21 Vict. c. clvii., the Court has jurisdiction in all cases where the debt or damages do not exceed 50*l.* if the cause of action even in part arose within the city. The prohibition was wrongly granted here, because the agreement under which the balance of purchase-money was payable, and for breach of which the action is brought, was executed by the plaintiff in the city. The agreements were exchanged in the city, and the deposit of 10*l.* was also paid there in accordance with the terms of the agreement. The execution of the counterpart by the defendant would not alone suffice to found the action. Being in duplicate, and the counterparts being signed for the purpose of their being exchanged, it is

clear that the agreement was not intended to be binding until both parties had signed and deposit paid. On the execution by the defendant alone of his deed it would be an escrow only—*Allhusen* v. *Malgarejo* (1).

C. E. Jones, for the defendant.—The plaintiff was in a position to sue directly the defendant had signed at Bow. There was an oral agreement as to the terms, and but for the Statute of Frauds such agreement would have bound the parties. To satisfy the statute a memorandum of that agreement was made, and on such memorandum signed by the party to be charged an action could be brought. The signature of the plaintiff was therefore immaterial to his case. The cause of action was therefore complete in Middlesex, and no part arose within the jurisdiction of the Mayor's Court.

G. M. Cohen, in reply.

GROVE, J.—In this case an application for the issue of a writ of prohibition to the Mayor's Court was made to Mr. Justice Field at chambers, who granted it; and against his order the plaintiff now appeals to the Court. The point raised is certainly arguable, and is one of some nicety. An agreement for the sale of some property, where the plaintiff was vendor and the defendant vendee, was made orally between the parties, and the action is in respect of the non-payment of the balance of the purchase-money due under such agreement. The agreement was reduced to writing, and put in duplicate, and the defendant signed one of the duplicates in Middlesex, outside the limits of the Mayor's Court jurisdiction, and the plaintiff afterwards signed the other within the jurisdiction.

It was argued upon this that an essential part of the agreement was executed in the city; and that as the action was for the breach of the agreement, part of the cause of action arose within the jurisdiction of the Mayor's Court. This could only prevail if the signature of both duplicates were necessary to constitute the agreement upon which an action could be brought. But I think that this is not so. The answer given is that there was a previous oral agreement, and that when this was put into writing and signed by the defendant everything had been done to charge the defendant. A writing was necessary by virtue of the Statute of Frauds, there being an interest in land involved, and this writing was signed by the party to be charged; immediately on such signature there was *prima facie* a binding agreement by her capable of being enforced by the plaintiff. It is suggested that the parties may have agreed that both should sign to make the agreement complete; but this is not shewn affirmatively, and the onus is on the plaintiff to establish this and displace the presumption that on the defendant's signature of one duplicate the cause of action, so far as the contract is concerned, was complete. I should myself draw the inference from the facts as they stand against this mere suggestion of the plaintiff, and I think that there was a completed agreement on which the defendant could be sued before the plaintiff signed as she did in the city.

SMITH, J.—I am of the same opinion. The question is, was this prohibition rightly granted on the facts. Did any part of the cause of action arise within the city? The action was brought on a written agreement signed by the defendant in Middlesex, outside the city; it is true that the plaintiff signed the duplicate in London, but what was the real cause of action? It was the breach of the agreement signed by the defendant. The plaintiff in order to recover was obliged to produce a writing, as the matter falls within the Statute of Frauds, and such writing must be signed by the party to be charged thereby. It was enough, I think, for the plaintiff to produce the duplicate, and prove that it was signed by the defendant, to establish her right to recover on proof of the breach. It is contended that the plaintiff must prove her own signature; but I think not: her right of action did not depend on her own, but on the defendant's signature of a memorandum of the agreement. It is contended further that though the defendant signed, yet, until the plaintiff signed, the document operated only as an escrow. Upon the facts before us this does not seem to have been intended. On the contrary, the defendant signed in pursuance of the agreement to

(1) 37 Law J. Rep. Q.B. 169; Law Rep. 3 Q.B. 340.

sign, and intending to bind herself. That being so, everything essential to the maintenance of the action occurred outside the jurisdiction of the Mayor's Court. For these reasons I think that the order was right, and the appeal must be dismissed.

Appeal dismissed.

Solicitors—Steavenson & Couldwell, for plaintiff; Phelps, Sidgwick & Biddle, for defendant.

[IN THE COURT OF APPEAL.]

1884. Nov. 13. THE SHEFFIELD AND SOUTH YORKSHIRE PERMANENT BUILDING SOCIETY *v.* HARRISON.*

Mortgagor and Mortgagee—Fixtures—Machinery passing with the Realty—Straps conveying Motive Power to Machinery—Bills of Sale Act, 1854 (17 & 18 *Vict. c.* 36).

The owner of a manufactory mortgaged to the plaintiffs his freehold premises, with the plant, engines, and fixed machinery, including certain leather belts therein especially described. These belts passed over wheels or pulleys, and were used to impart motion to the fixed machinery which formed part of the freehold. When passed over these pulleys they were laced together. They could be slipped off the pulleys when desired, and then they hung loose, but they could not be removed from the machinery without being unlaced:—Held, *that these belts formed an essential part of the fixed machinery, and therefore that they passed like that machinery under a mortgage of the realty, and that the deed conveying them to the plaintiffs did not require registration under the Bills of Sale Act*, 1854 (17 & 18 *Vict. c.* 36), *the Act which was in force when the mortgage deed was executed, though since repealed.*

Longbottom *v.* Berry (39 Law J. Rep. Q.B. 37) *approved.*

Appeal by the plaintiffs from the judgment of Field, J., after trial without a jury.

Action for the conversion of certain leather belts forming part of machinery affixed to the freehold of certain premises.

In 1875 Robinson and Hughes were partners in a wheel manufactory at the Mersey Works in Derby. On the 31st of December, 1875, they mortgaged the freehold premises, the engines, plant, all the fixed machinery and gear, and particularly all the things described in a schedule to the mortgage, to the plaintiffs for 12,000*l.* Amongst the things described in the schedule were a number of leather belts, which, passing over two drums, wheels, or pulleys, communicated the motive power from an engine to the fixed machinery which passed with the freehold. The description of these belts, of their arrangement, of their effect, and of their mode of user was the same as that set out in paragraphs 49 and 50 of the Case stated in *Longbottom* v. *Berry* (1). The mortgage was not registered under the Bills of Sale Act, 1854 (17 & 18 Vict. c. 36), the Act then in force. The partnership was afterwards dissolved, and Hughes carried on the business alone. In 1880 Hughes went into liquidation, when the defendant was appointed trustee in the liquidation. The defendant carried on the business for ten months, and used these belts in the business. In 1881 he removed the belts from these works, and transferred them to another business in which he was interested as the trustee of Hughes. Later on in 1881 the plaintiffs, desiring to realise their mortgage debt, contracted to sell the Mersey Works; but the purchasers refused to complete, as these leather belts had been removed. The plaintiffs then undertook to obtain these belts or their value, and the purchasers completed the purchase. The defendant refused to return the belts, and the plaintiffs now sued him for their value, which was agreed upon at 50*l.*

Field, J., gave judgment for the defendant.

The plaintiffs appealed.

Waddy, Q.C., and *E. Wilberforce*, for the appellants.—These belts are similar to and perform the same duty as those described in *Longbottom* v. *Berry* (1). They

* *Coram* Brett M.R., Cotton, L.J., and Lindley, L.J.

(1) 39 Law J. Rep. Q.B. 37 at p. 48; Law Rep. 5 Q.B. 123, at p. 134.

are therefore part of the fixed machinery, and are themselves trade fixtures; they pass therefore with the freehold, and 17 & 18 Vict. c. 36 does not apply. *Longbottom* v. *Berry* (1) has been approved of in *Holland* v. *Hodgson* (2) in the Exchequer Chamber; and the test there given shews that these belts passed to the plaintiffs by the mortgage.

They were stopped by the Court.

Bosanquet, Q.C., and *A. T. Lawrence*, for the defendant.—The Bills of Sale Act, 1854 (17 & 18 Vict. c. 36), applies to these belts, for they are personal chattels and not fixtures; they can be disconnected from the machinery, and can be removed and applied to other machinery, by merely unlacing them.

[BRETT, M.R.—They are riveted together so as exactly to fit in length the two drums or pulleys. To be removed they must be unriveted; to fit another machine they must be altered, unless perchance it be a machine of exactly the same construction and size.]

If they are personal chattels then the mortgage does not include them, for it is not registered under 17 & 18 Vict. c. 36, and they are not part of the machinery affixed to the land. *Longbottom* v. *Berry* (1) lays down the principle of law; it does not conclude the defendant on the question of fact. It may there have been admitted that the belts or straps were part of the fixed machinery, but that case does not decide that all straps or belts used for machinery must be part of such machinery. "Perhaps the true rule is that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land unless the circumstances are such as to shew that they were intended to be part of the land, the onus of shewing that they were so intended lying on those who assert that they have ceased to be chattels." This rule, laid down in the judgment in *Holland* v. *Hodgson* (2), is what the defendant relies on; and, accepting that rule, it is contended that these belts are not shewn to have ceased to be chattels, and therefore that the plaintiffs are not entitled to claim them under the mortgage to them.

(2) 41 Law J. Rep. C.P. 146; Law Rep. 7 C.P. 328.

BRETT, M.R.—It seems to me that this mortgage deed did not require registration as a bill of sale under the Act which was in force in 1875, unless the belts which are the subject of this appeal were treated as personal chattels, or were in fact mere personal chattels. In this case the machinery on which these belts were fixed was in law, as is admitted, part of the freehold, so as to pass by the mortgage; and it is contended on the one side that the belts formed part of that machinery, so that they also were part of the freehold; while it is urged by the respondent that they did not form part of that machinery, and therefore that they did not so pass. These leather belts are stated in the evidence which was adduced at the trial to be belts which impart motive power to the machinery and which make it work. When the whole machine is in gear these belts pass round two drums or wheels, and by this means impart motive power to the fixed machinery; they must therefore be of a length exactly to fit the two drums, otherwise no effect will be produced, and motion will not be imparted. When the machine is out of gear then the belts are slipped or thrown off the drums; but they still remain upon the machine, they are only moved from one part to another part of the machine, they are in fact a necessary part of the whole machine, and will not produce the desired effect if put upon another machine without alteration, unless by chance that other machine is of exactly the same size as the machine from which they have been removed. Such a question as that raised in this case is really a question of fact, although there is also a question of how the principle of law is to be applied to the facts of each case. In *Longbottom* v. *Berry* (1) it was held that leather belts, which it appears from the description given in paragraphs 49 and 50 of that case were belts such as these, fitted as these belts are fitted, and incapable, as these belts are incapable, of being used with any other machine, were really part of the machine, and that if the machine to which they are attached is in consideration of law part of the realty, then every part of that machine is in consideration of law also part of the realty. They must of course be really part of the machine, and not merely be

connected with it; and then, according to that case, all that is an essential part of the fixed machinery must be held to pass under a mortgage of the realty: so that the mortgage deed does not require registration as a bill of sale. Such was the law as laid down and settled in *Longbottom* v. *Berry* (1) some fifteen years ago, so that deeds of mortgage have been continually drawn and settled on the faith of the law being such as it is stated in that case to be. It is suggested that that judgment was given upon admissions, and that the facts there admitted were wrongly admitted, and we are in consequence asked to interpret the law with regard to similar facts in a different way. Even if I thought the decision in *Longbottom* v. *Berry* (1) wrong I should decline to depart from it; but I am of opinion that it was rightly decided, that it governs this case, and that this appeal must therefore be allowed.

COTTON, L.J.—I am of the same opinion. It was urged that the admissions in *Longbottom* v. *Berry* (1) could not be considered binding upon the Court in this case. That is undoubtedly true, admissions between parties in one case do not bind other parties in another case; but in *Longbottom* v. *Berry* (1) the law was laid down with reference to those admissions, and those admissions are true with regard to the leather belts the subject of discussion in this case, so that the law as there laid down is applicable to the similar facts which exist in this case. I am of opinion, therefore, that this case is within the principle of *Longbottom* v. *Berry* (1), and I think that the decision in that case was right. In this case there was a mortgage, which included the land and all the machinery affixed to the freehold, and particularly certain things, amongst which were these belts, described in a schedule to the mortgage deed. These belts were an essential part of the machinery which was affixed to the freehold and which passed with the land. The leather belts were made and fitted to suit that machinery, and would not fit any other machinery unless it chanced that that was machinery of exactly the same size and nature—so that they were, as I have said, an essential part of the machinery. Keys of doors and other things have been held to pass with the land under a conveyance of freehold without being particularly described. I think, therefore, that this appeal must be allowed.

LINDLEY, L.J.—I am of the same opinion. This mortgage passed these leather belts; and the question is whether, regard being had to the Bills of Sale Act, 1854, which was in force at the time this mortgage was made, the mortgagee had a good title to those belts. By that Act the expression "personal chattels" included fixtures; but that Act applied to fixtures which were dealt with separately from the land, and I have looked at the mortgage-deed in this case, and I find that it does not deal with these things separately from the land. I agree, therefore, that the mortgagee is entitled to these belts, and that the appeal must be allowed.

Appeal allowed.

Solicitors—E. Warriner, agent for Mole & Stone, Derby, for appellants; G. Lucas, agent for Broomhead, Wightman & Moore, Sheffield for respondent.

1884. Nov. 24.

SAYWOOD *v.* CROSS.

Practice—Costs—Order LXV. rule 12—*Breach of Promise of Marriage—Taxation—Verdict for* 20*l.*

Rule 12 *of Order LXV., providing that where in actions founded on contract brought in the High Court a plaintiff recovers a sum between* 20*l. and* 50*l. he shall be entitled to costs on the County Court scale only, does not apply to an action for breach of promise of marriage, inasmuch as it could not have been commenced in the County Court.*

This was an appeal from a refusal to review the taxation of costs in an action for breach of promise of marriage, in which the plaintiff had obtained judgment for

Saywood v. *Cross.*

20*l.*, the amount awarded her by the verdict of a jury.

The Master taxed the costs in favour of the plaintiff on the High Court scale, whereupon the defendant applied for a review of taxation on the ground that by virtue of Order LXV. rule 12 the plaintiff was only entitled to costs on the County Court scale. Review of taxation was refused by the Master, and on appeal the Judge referred the matter to the Court.

Earle, for the defendant. — This case comes within the exact words of rule 12 of Order LXV. The action is founded on contract, and the plaintiff recovered only 20*l.* The intention was to impose a kind of penalty on persons bringing actions in the High Court where so small an amount should be recovered.

[MATHEW, J.—This action could not have been brought in the County Court.]

That is not the test, nor so stated in the rule. In *Sampson* v. *Mackay* (1) section 5 of the County Court Act, 1867, was held to be general and to apply to an action of slander, though it could not have been brought in the County Court.

Cluer, for the plaintiff, was not called upon to argue.

MATHEW, J.—I think that this appeal should be dismissed. Rule 12 of Order LXV. is not applicable to the case of an action which could not have been brought originally in the County Court. The intention of that rule is to compel plaintiffs to bring in the County Court such actions as may properly be commenced there, but it does not touch actions which necessarily must be begun in the High Court. The statute gives a successful plaintiff in an action of breach of promise of marriage her costs, unless the County Court Acts apply to deprive her of them. If this rule were to say otherwise I should be disposed to hold it to be *ultra vires*. The case cited of *Sampson* v. *Mackay* (1) was decided under the words of a statute differing from those of this rule, and does not govern the present case.

SMITH, J.—I am of the same opinion, and also think that this rule does not apply to actions for breach of promise, which could not be brought in the County Court at all.

Appeal dismissed.

(1) 33 Law J. Rep. Q.B. 245; Law Rep. 4 Q.B. 643.

Solicitors—C. R. Preston, for plaintiff; Postans & Landons, for defendant.

[IN THE COURT OF APPEAL.]

1884. Nov. 10, 22. } LEIGH *v.* DICKESON.*

Tenancy in Common—House—Repair by Tenant in Common—Liability of Co-tenant to Contribution—Lease by Tenant in Common—Holding over by Assignee of Lease who has become Co-owner.

One tenant in common of a house is not entitled merely by virtue of his relation to his co-tenant to recover from him money expended on the repair of the house but not for the purpose of preventing its destruction. The only remedy by which contribution may be obtained in such a case is by a partition suit, where the Court will take into account reasonable expenditure on the subject-matter of the tenancy.

The assignee of a lease from a tenant in common seised of an undivided three-fourths of a house, purchased the one-fourth share of the other tenant in common, and continued in possession of the house after the expiration of the lease. A correspondence then took place between the assignee and the lessor, but without result, as to a continuance of the tenancy and the amount of rent to be paid:—Held, *that the assignee was liable as a tenant at sufferance to pay to the lessor, by way of use and occupation, the rent reserved in the lease.*

Appeal of the defendant from the judgment of Pollock, B., reported 53 Law J. Rep. Q.B. 120.

The action was brought by the plaintiffs, as trustees of a Mrs. Eyles, to recover from the defendant (*inter alia*) the sum of 24*l.* 9*s.* 6*d.*, alleged to be due to them

* *Coram* Brett, M.R., Cotton, L.J., and Lindley, L.J.

for the use and occupation by him of three-fourths of a certain house. The defendant by way of counter-claim charged the plaintiffs with a sum of 80*l.*, which he alleged that he had expended in substantial and other proper repairs and improvements upon the house after the expiration of a lease under which he had occupied the house.

The following were the material facts: In 1860 Mrs. Eyles (then Mrs. Worger) was entitled to an undivided three-fourths of the house in question, as tenant in common with another; and on the 4th of January of that year Mrs. Worger by lease let her interest to one Prebble for twenty-one years, at a rent of 33*l.* 15*s.* per annum. The lease contained a covenant by the tenant to execute internal repairs, and by Mrs. Worger to execute external repairs. In 1865 Prebble assigned the lease to the defendant, who entered and paid rent. In 1871 the defendant purchased the interest of the other tenant in common. On the 6th of January, 1881, the lease expired, and the defendant continued in possession. A correspondence then took place between the plaintiffs and the defendant and their solicitors with a view to continue the tenancy; but the plaintiffs asking an advanced rent, which the defendant was unwilling to pay, no further agreement was effected.

In February, 1882, the present action was commenced, the plaintiffs claiming for use and occupation after the expiration of the lease; whereupon the defendant counter-claimed for the cost of the repairs in question which had been executed by him during that period. To the counter-claim the plaintiffs demurred.

There was no evidence to shew that the repairs were such that but for them the subject-matter of the tenancy in common would have perished, or that they were not necessary for keeping the house in tenantable condition.

Pollock, B., gave judgment for the plaintiffs upon both the claim and counter-claim.

The defendant appealed.

Finlay, Q.C., and *C. A. Russell*, for the appellant.—As to the claim, mere use and occupation by a tenant in common does not give a claim for rent or for use and occupation, unless there is a special contract—*M'Mahon* v. *Burchell* (1) and *Henderson* v. *Eason* (2). The defendant could not be said to be a tenant on sufferance, for being the owner of an undivided fourth he could not be said to be without title. Nor could he be said to be tenant at will of the plaintiffs. As to the counter-claim, the defendant is entitled to call on the plaintiffs to contribute to the repairs. In *Lewis Bowles's Case* (3) it is said, "If there be two joint tenants of a house, the one shall have a writ *de reparatione facienda* against the other, and the words of the writ are, *ad reparationem et sustentationem ejusdem domus tenetur.*" The writ is referred to in *Fitz. N. B.*, 127, 162; *Co. Lit.* 200 *b.*; *Vin. Abr.*, tit. "Contribution," s. 14.

The following authorities were also cited:—*Doe* d. *Knight* v. *Spencer* (4), *Pascoe* v. *Swan* (5), *Teasdale* v. *Sanderson* (6), *Dig.*, 17, 2. 52. 10; and *Seton on Decrees* (7).

E. Pollock and *Gore*, for the respondents, were called upon to argue whether, assuming the plaintiffs to be entitled to rent, it was to be paid *simpliciter* or on the condition of the plaintiffs paying for the repairs.

[COTTON, L.J.—The plaintiffs are bringing an action to recover rent during the occupation of the co-tenant; but does not that carry an obligation to allow for sums properly expended by the defendant on repairs? If so, has the defendant any right to bring an action for contribution?]

Such a claim can only be made where there is a suit for partition—*Pascoe* v. *Swan* (5), *Henderson* v. *Eason* (8), and *Agar* v. *Fairfax* (9).

Cur. adv. vult.

The following judgments were delivered on November 22:—

(1) 5 Hare, 322; 2 Ph. 127.
(2) 17 Q.B. Rep. 701; 21 Law J. Rep. Q.B. 82.
(3) Co. Rep. pt. 11, 82*b*.
(4) 2 Exch. Rep. 752.
(5) 27 Beav. 508; 29 Law J. Rep. Chanc. 159.
(6) 33 Beav. 534.
(7) Vol. ii. part i. at p. 1018.
(8) 2 Ph. 308; 15 Law J. Rep. Chanc. 457.
(9) White & Tudor's L.C. vol. ii. p. 419.

Leigh v. *Dickeson, App.*

BRETT, M.R.—The defendant and the person on whose behalf the plaintiffs are suing were tenants in common of a house. The defendant, who has executed and paid the costs of certain repairs which may be taken to have been reasonable and necessary for the maintenance of the house, claims to recover from his co-tenant a share, in proportion to her interest, of the money so expended. The question is whether the facts bring the case within any recognised principle of law which entitles the defendant to recover. It is not pretended that there was any express request by the co-tenant to the defendant to do the repairs or to expend money on her behalf. There is no doubt where a plaintiff has expended money at the express request of the defendant, or where he has been appointed agent for the defendant in a class of business which requires an expenditure of his money in order to carry on the business, that he is entitled to recover it from the defendant. But the law has gone further; and although there may be no such request in point of fact, and no act of the defendant appointing the plaintiff his agent, yet if the defendant requests him to do that which will impose a legal liability to pay money, a promise will be implied from that request that the defendant will repay him whatever money he has laid himself under an obligation to pay and has in fact paid. The law has lately been extended still further, for it has been decided (10) that if the defendant has requested the plaintiff to pay money in such circumstances that although the plaintiff cannot be compelled to make the payment, yet if he does not do so he will be injured in his business or social position, although that business is not recognised by the law, then a promise to repay the plaintiff will be implied. That was, in my opinion, an extreme case; but it was so decided. It has, however, always been equally clear law that a plaintiff cannot compel repayment from a defendant of money which he has paid voluntarily, upon the ground that it was expended for the benefit of the defendant and that the defendant has reaped the benefit of such expenditure. If one pays money voluntarily for another in such circumstances that the other is at liberty to accept or reject the advantage, then if he adopts and ratifies that which was done for him he becomes liable, although the payment was a voluntary payment. But if the money is voluntarily expended in such circumstances that the other is obliged to reap the advantage of it, the mere fact of his having accepted that which he was not at liberty to refuse is no evidence of his adoption or ratification of the payment, and the one who has made such voluntary payment must suffer for his generosity. The question therefore is, under which head does the payment in this case come? The interests which these persons have in the house, although independent, are in point of fact combined. The money expended by the defendant on the property for the purpose of putting it into repair was certainly at first a voluntary payment on his part. He was not requested, nor was there anything in the relation between the parties to give him authority from the other, to expend the money. They were not partners; and there was nothing in the relation between them to make the defendant the agent of the other person. The payment was a voluntary one, and was made partly for his own interest, and partly for the advantage of his co-tenant; but it was an advantage which the other was not at liberty to accept or refuse. The case therefore comes within the second principle of law which I have stated, and the defendant is not entitled to recover the money which he has expended. Again, the money so expended is not recoverable at common law as money paid; that is a legal remedy, and if it could have been so recovered at law, the Court of Chancery would never have interfered. But that Court has entertained a remedy: for where a final disagreement has arisen between parties who are joined together as co-tenants, the Court will divorce them in a partition suit, and in doing justice between them will take into account and regulate such an expenditure. An ancient writ which was cited seemed to me to look like a common law writ, and it would, as far as I understand it, be a mandatory writ. But I think the proper way to deal with it is to say that it has become obsolete, because it was unworkable as a common

(10) As to this see *Read* v. *Anderson*, 53 Law J. Rep. Q.B. 532; Law Rep. 13 Q.B. D. 779.

law writ, and as there was no adequate remedy at law the Court of Chancery entertained the matter. But that Court only did so by a writ of partition, which was the sole remedy known in such a case. The strongest evidence that that is so is that, having had the assistance of my learned brethren and of the counsel on both sides, no case has been cited either at common law or in equity in which one co-tenant has, except in the case of a partition suit, been held liable to make such a payment as the defendant claims; and yet the dispute must have arisen over and over again, and it is probably the reason why the Court of Chancery entertains partition suits. If any further reason can be required for the present decision, it is that if we uphold this counter-claim one tenant in common would be able to make his co-tenant liable for expenses which, for reasons whether good or bad, he might have been unwilling to incur; but the law does not oblige a person to be reasonable about his own property. It is clear the counter-claim cannot be supported, and the appeal must therefore be dismissed.

COTTON, L.J.—I am of the same opinion. The plaintiffs are the trustees of a person who was tenant in common of a house with the defendant. The action was to recover rent, and there was a counter-claim by the defendant for certain money expended by him on the repair of the house. As regards the rent, I am of opinion that the plaintiffs are right. The defendant says that in ordinary circumstances one tenant in common cannot recover rent from another co-tenant in possession; that both may enjoy the property, and that the one in possession, unless the other is ousted, is not liable for rent. But here the defendant was not originally tenant in common, but was in possession under a lease. After the expiration of the lease he continued in possession, and there was a correspondence about rent, and a question as to what amount was to be paid. In these circumstances, as the defendant held continuously under the lease, he must be considered as holding exclusive possession, and was therefore, in my opinion, properly held liable to the plaintiffs for rent.

With regard to the repairs, we are not able to tell what they are; but it is stated that the defendant expended money in substantial and other proper repairs and improvements upon the premises. I think we must take it that the money was expended in necessary repairs for the purpose of keeping the house in tenantable condition. As to the improvements, it was suggested that they should be allowed; but we need not discuss that, because no tenant in common is entitled to improve the property and then say that his co-tenant is to pay him a share of the cost of improvements which were done without his request. No doubt where two persons are under a common obligation, which one of them has discharged, to do repairs, the other one on whose behalf the money has been expended is liable to repay the money so expended. But one of two tenants in common does not stand in that position to the other, even as regards necessary repairs. There is no difference as regards the obligation of two co-tenants and that of a sole owner to repair, though instead of their being one sole owner there are two persons having this interest as tenants in common. No request, expressed or implied, having been suggested, I can see in principle no ground for saying that a common law action would lie to recover the money, or that equity would allow any claim by one tenant in common against another for repairs except in the case I have mentioned. It was suggested that a common law writ of contribution as between tenants in common is mentioned in *FitzHerbert's Natura Brevium* (p. 162); but that writ will be found to assume that an obligation is imposed upon the tenants in common to do repairs, for it says: "To the King and the sheriff. . . . if A shall make you secure . . . . then summon . . . . B and C that they be . . . . at W to shew wherefore whereas they the said A, B, and C jointly hold a certain mill undivided in N, and the issues thence coming by equal portions partake, and are bound to the reparation and support of the same mill, and the said B and C (although they receive the proportion of those issues happening to them) refuse to contribute to the reparation and support of the said mill, to the great damage of the said A as

he saith." That writ may probably refer to a case where there was an obligation by tenure or otherwise to repair a mill, and where a person under such an obligation refused to fulfil it; but it is not applicable to a case like the present. No doubt a reference to the writ is to be found in *Coke on Littleton* (200, *b*) in this way: "If two tenants in common or joint tenants be of a house or mill, and it fall in decay, and the one is willing to repaire the same and the other will not, he that is willing shall have a writ *de reparatione facienda*; and the writ saith, *ad reparationem et sustentationem ejusdem domus teneatur*; whereby it appeareth that owners are in that case bound *pro bono publico* to maintain houses and mills which are for habitation and use of men." I cannot but think that he has mistaken the writ mentioned by FitzHerbert. If the sole owner of a house is not under any obligation to repair, I cannot see how joint owners are. In my opinion no difficulty arises from the writ mentioned in *FitzHerbert.*

But in my opinion it is not the case that there is no remedy at all. There is no remedy so long as the two tenants in common are willing to enjoy the property in its existing state. Unless there is an express or implied request, the one cannot, as I have stated, recover against the other, but there is a remedy in a partition suit. In the decrees in such suits it is common to have an enquiry whether either of the co-tenants has expended money in the repair or improvement of the property. So long as both parties are agreed to enjoy the property as tenants in common there can be no common law action, and therefore no action in equity, in order to make one contribute. But where the one tenant in common desires to put an end to that state of things, and asks the other for a partition or sale of the property, then the property is to be held in a different way: the money derived from the sale is directly increased by the expenditure incurred for the benefit or improvement of the property; or, if there is a division of the property *in specie*, the property to be divided is increased. Therefore if the property is to be divided and enjoyed in a different way, the one who has not contributed at all and was not bound to contribute cannot take the property, the value of which has been so increased, without making an allowance to the co-tenant. It may be that he is in such a case to be considered as having adopted the expenditure by taking the improved value of the property in severalty; but the remedy is confined to a partition suit. There is therefore a remedy which is available if the tenants in common cannot agree, and it is a sufficient and the only remedy.

LINDLEY, L.J.—The first question is as to the right of the person who is represented by the plaintiffs to recover rent from the defendant in respect of her proportion of the property which was held by both in common and was occupied exclusively by the defendant. The second question is as to the right of the defendant to call upon her to contribute towards the costs of certain repairs which he has done upon the property. As to the rent, the defendant held under a lease, and continued to hold after its expiration. He cannot say that he has proved by the evidence that the relation of landlord and tenant was ever determined, for he never gave up possession. He never made it clear beyond all doubt that he was doing anything other than that which a person would do who holds over after the expiration of a lease. It appears to me that this is another instance in which the inference should be drawn that he is liable to pay the plaintiffs at the old rate. That was the conclusion at which the Court of Common Pleas arrived in *Bayley* v. *Bradley* (11).

Then arises the more difficult question, whether the defendant's co-tenant is liable to contribute towards the sum expended by the defendant for repairs, which I assume to have been necessary to keep the property in a proper state. On that point I have looked into the authorities in order to see whether there was to be found any trace of an obligation on the part of one tenant in common to contribute to expenditure on repairs by his co-tenant. I take it that no action lies without an express request, unless there is some duty on the part of one co-tenant towards the other to

(11) 5 Com. B. Rep. 397; 16 Law J. Rep. C.P. 206.

repair or to contribute to the expenses of the repairs. Passages in *Coke* and *Fitz-Herbert* were referred to on this point in question, but it appears to me that they do not go the length contended for. The language in *FitzHerbert* most in favour of the defendant is not to be found at page 126 under the heading "*Writ de reparatione facienda*," but at page 162, where a writ of contribution is referred to. He says, "The writ of contribution lieth where there are tenants in common, or who jointly hold a mill *pro indiviso*, and take the profits equally, and the mill falleth into decay, and one of them will not repair the mill; now the other shall have a writ to compel him to be contributory to the reparations; and the writ is such . . . ." Now two things are to be observed here. First, it is a case in which the tenants in common are tenants of the mill, and also have a share in the profits of the mill. Secondly, the writ says that all the tenants are bound; not that one is bound to the other. But there can be no such obligation on the part of all the tenants in common, except on one of two grounds—first, by reason of tenure, as where the owners of a mill are entitled to a monopoly, and can compel all the people living about the mill to buy at the mill, in which case there would be a duty to those who are bound to buy at the mill; secondly, on the ground of public nuisance. But this is a case of a mere tenancy, and it cannot be gathered from the pleadings, nor is there any suggestion here that there is a common obligation to do any repairs.

Then there is this difficulty: Suppose a difference of opinion arises between two tenants in common of a farm as to whether it is proper to repair or not—can the one repair the property and make the other pay his share? There is no trace of an action at law or suit in equity for any such expense. It appears to me that, inasmuch as such quarrels must be of almost daily occurrence, it is very significant that no trace can be found of a remedy for such a state of things, except the only workable remedy—namely, a partition suit. Tenancy in common is a tenure which is useful, if the tenants are all of one mind; but it is utterly unfit if they cannot agree. All questions arising between the parties can be set right in a partition suit; each tenant gets his share of the value of the property, and, in ascertaining that value, all proper expenditure upon the property is taken into consideration. The appeal must therefore be dismissed.

Appeal dismissed.

Solicitors—Bower, Cotton & Bower, agents for J. Stilwell, Dover, for appellants; Palmer & Bull, agents for Lamb & Evett, Brighton, for respondent.

[IN THE COURT OF APPEAL.]

BANKRUPTCY. 1884. July 4. } *Ex parte* OASTLER; *in re* FRIEDLANDER.*

Bankruptcy—Act of Bankruptcy—Statement by Debtor of Inability to pay Debts in full—Notice of Suspension of Payment—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*h*).

A debtor, in conversation with one of his creditors who was deputed by the general body of creditors to meet him, stated that he was unable to pay his debts in full, and offered a composition of twenty per cent.:—Held, *that this did not amount to a notice, within sub-section* 1 (*h*) *of section* 4 *of the Bankruptcy Act*, 1883, *that the debtor had suspended or was about to suspend payment of his debts, and was therefore not an act of bankruptcy.*

This was an appeal against a decision of Mr. Registrar Brougham rescinding a receiving order which had been made against the estate of Friedlander & Co., who carried on business as leather merchants in London and Paris.

The receiving order was made upon a bankruptcy petition founded upon an alleged act of bankruptcy committed by the debtors—namely, that within three months of the date of the petition they had given

* *Coram* Baggallay, L.J. Cotton, L.J., and Lindley, L.J.

notice to all or some of their creditors that they had suspended or were about to suspend payment of their debts.

In support of the petition an affidavit was made by one of the creditors, who deposed that, having been instructed by the English creditors of the debtors to proceed to Paris, he, in company with the solicitor for the English creditors, went to Paris on the 16th of April, 1884, and, at the request of Friedlander and another member of the firm who were residing there, he and the solicitor had a conversation with them, when Friedlander stated that he had started in business six or seven years ago without any capital, and that he was unable to pay the debts of the firm, and he offered a dividend of twenty per cent. He also stated that he could obtain assistance from his brother-in-law, provided that he could make some arrangement with his creditors. He also said that if the creditors would accept the composition he offered, he should look upon the balance as a debt of honour, which the firm would pay in full.

The Registrar rescinded the receiving order on the ground that this particular act of bankruptcy must be committed in England.

The petitioning creditors appealed.

R. Vaughan Williams, for the appellants.—The conversation which took place between the debtor and the representative of the creditors amounted to a notice that the firm were about to suspend payment of their debts within sub-section 1 (*h*) of section 4 of the Bankruptcy Act, 1883 (1), and even if such notice was given in Paris the Court has a discretion which it ought to exercise by making a receiving order. Such a notice need not be in writing; it may be verbal—*Ex parte Nickoll* (2). A case may come within the sub-section even if the words "suspend payment" are not used. It is not necessary to use the very words of the section. If so, where is the line to be drawn? The notice must in substance convey that the debtor is about to suspend payment. An intimation to one creditor that the debtors were unable to pay all the creditors in full but could only pay twenty per cent., was surely a notice that the firm was unable to go on; otherwise a debtor might go to his creditors with a form of declaration of his inability to pay his debts and read it over to them, and yet it would be said that he was not giving them notice of his intention to suspend payment.

[BAGGALLAY, L.J., referred to sub-section 1 (*f*), which requires that a declaration of inability to pay debts should be "filed in the Court" in order that it may constitute an act of bankruptcy.]

The intention of the Legislature was that, if the debtor's affairs were in such a state that he must admit his inability to pay his debts, his own admission would be a sufficient ground for administering his estate in bankruptcy.

[COTTON, L.J.—An intimation by a debtor that he cannot pay his debts in full is by no means a notice that he intends to stop paying them.]

Cooper Willis, Q.C., and *Israel Davis*, for the debtors, were not called upon.

BAGGALLAY, L.J. (after alluding to the alleged act of bankruptcy and reading section 4, sub-section 1 (*h*).)—In my opinion the conversation which took place did not amount to such a notice of an intention to suspend payment as is contemplated by the section. Having regard to the terms of sub-section 1 (*f*), I do not think that a statement by a debtor that he is unable to pay his debts is equivalent to a notice that he is about to suspend payment. A declaration of inability to pay debts must be "filed in the Court" before it constitutes an act of bankruptcy. And it can hardly be that, while sub-section 1 (*f*) requires that formality to be observed in order to constitute such a declaration an act of bankruptcy, yet under sub-section 1 (*h*) a mere informal verbal declaration of inability to pay debts should constitute an act of bankruptcy. I think that what took place in the present case was not such

(1) Section 4 (1) enacts that a debtor commits an act of bankruptcy (*f*) "If he files in the Court a declaration of his inability to pay his debts or presents a bankruptcy petition against himself." (*h*) "If the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts."

(2) Law Rep. 13 Q.B. D. 469.

a notice that the debtors were about to suspend payment as is contemplated by the Act.

COTTON, L.J.—I am of the same opinion. Of course we must consider all the circumstances as well as the actual words used by the debtor. He did not in fact intimate to his creditors that he had suspended or was about to suspend payment of his debts. All he said was that his assets were insufficient to pay the debts of the firm in full, and he proposed an arrangement by which all his creditors would receive more than they would get otherwise. That is a very different thing from saying that he had suspended or was about to suspend payment.

LINDLEY, L.J.—I am of the same opinion. The first question is, what is the meaning of a debtor's giving notice that he has suspended or is about to suspend payment of his debts? I think it means something more formal than mere casual conversation, something done by the debtor with a consciousness that he is "giving notice," and intended to be understood in that sense. I am of opinion that what passed in the present case did not amount to a "giving notice" within the meaning of the Act. If it was a notice at all, it was only a notice that the debtor might have to make a composition with his creditors, and not that he had suspended or was about to suspend payment of his debts.

Solicitors—Emanual & Lousada, for appellants; Atkinson & Dresser, agents for T. Barclay, Paris, for debtors.

[IN THE HOUSE OF LORDS.]

1884. March 14, 17. } THE BRIERLEY HILL LOCAL BOARD *v.* PEARSALL.

Public Health Act, 1875 (38 & 39 *Vict.* c. 55), *ss.* 179, 180, *and* 308—*Compensation for Damage sustained by the Exercise of the Powers of the Act—Arbitration—Dispute as to Liability and as to Amount—Order in which Questions are to be decided.*

A person who claims compensation for damage sustained by reason of the exercise of the powers of the Public Health Act, 1875, *is entitled under section* 308 *to have the amount of compensation determined by arbitration in the manner provided by that Act, even though a dispute exists as to the liability of those from whom he seeks to recover compensation; and the prior determination of that question of liability is not a condition precedent to the claimant's right to go to arbitration to settle the amount.*

The defendants appealed from the decision of the Court of Appeal in this case, reported 52 Law J. Rep. Q.B. 529; Law Rep. 11 Q.B. D. 735.

The respondent, claiming to be entitled to compensation for damage done to him by the appellants by altering the level of a road in front of his house, appointed an arbitrator under the Public Health Act, 1875, to ascertain the amount of compensation. The appellants refused to appoint an arbitrator, contending that they had not acted under the Public Health Act, but as surveyors of highways, and were not liable to pay compensation. They attended under protest before the respondent's arbitrator, who awarded the respondent 234*l.*

This action was brought on the award, and the appellants defended it upon the ground that the question of liability ought to have been determined before any arbitration as to the amount.

Bowen, L.J., who tried the case without a jury, decided in favour of the appellants' contention; but his judgment was reversed by the Court of Appeal.

Jelf, Q.C., and *Kettle*, for the appellants.—The appellants must succeed if any one of the three following propositions be made

out—namely, first, that the arbitrator has no jurisdiction where there is a *bona fide* dispute as to liability; secondly, that he has no jurisdiction where, there being such a dispute, he cannot decide the amount of compensation without deciding the question of liability; thirdly, that where he does in fact decide the question of liability his award is bad on the face of it. Here there is a question of liability depending on whether the appellants exceeded their powers as surveyors of highways—*Burgess* v. *The Northwich Local Board* (1). As compensation can only be given for anything they have done in excess of their powers, the amount cannot be found without deciding the question of liability. In fact, in the award the whole damage is mixed and cannot be disentangled.

The analogy of the Lands Clauses Consolidation Act is against the appellants, but ought not to decide the question. The practice under that Act leads in many instances to unsatisfactory results, and ought not to be extended. The appellants' contention is supported by *The Queen* v. *The Metropolitan Commissioners of Sewers* (2), *Bradby* v. *The Southampton Local Board of Health* (3), *The Queen* v. *The Burslem Local Board* (4) and *The London and North Western Railway Company* v. *Smith* (5). The case of *The Bradford Local Board* v. *Hopwood* (6) is at variance with the other cases, and is treated as wrongly decided in *The Queen* v. *The Burslem Local Board* (4). In *The Queen* v. *The Wallasey Local Board* (7) the question of liability was decided first. The case of *The East and West India Dock Company* v. *Gattke* (8) was a decision on the Lands Clauses Consolidation Act, the language of which is different from that of the Public Health Act—see *Ex parte Rayner* (9).

It is more convenient to have the question of liability determined first, as difficulty is caused, when the question is raised later, by the fact that the parties are ignorant of the grounds upon which the arbitrator went in forming his opinion. They may be obliged to call the arbitrator, as in *The Duke of Buccleugh* v. *The Metropolitan Board of Works* (10), where Martin, B., in advising the House of Lords, observed on the inconvenience of taking the umpire's evidence. In *Rhodes* v. *The Airedale Drainage Commissioners* (11) a Special Case was ordered; but that is a doubtful authority.

In *The Queen* v. *The London and North Western Railway Company* (12) the verdict was held bad because it dealt with a matter which was beyond the jurisdiction of the jury.

Bosanquet, Q.C., and *A. T. Lawrence*, for the respondent, were not called upon.

THE LORD CHANCELLOR (EARL OF SELBORNE).—In this case there really appears to me to be nothing in favour of the claim made by the appellants, except for some observations which were made in two of the authorities to which we have been referred—namely, in the case of *The Queen* v. *The Metropolitan Commissioners of Sewers* (2), and in the case of *The Queen* v. *The Burslem Local Board* (4). But for those observations I should think that it was impossible to distinguish the clause in the Public Health Act from the clause in the Lands Clauses Consolidation Act, upon which, as has been very fairly and properly admitted, there has been a series of decisions which have practically put an end to every question of this kind. The Lands Clauses Consolidation Act in section 68 begins with the words, "If any party shall be entitled to any compensation" under the Act, either for lands taken or

(1) 37 Law Times, 355; 50 Law J. Rep. Q.B. 219; Law Rep. 6 Q.B. D. 264.
(2) 1 E. & B. 694; 22 Law J. Rep. Q.B. 234.
(3) 4 E. & B. 1014; 24 Law J. Rep. Q.B. 239.
(4) 1 E. & E. 1077; ibid. 1088; 29 Law J. Rep. Q.B. 21; 243.
(5) 1 Mac. & G. 216; 19 Law J. Rep. Chanc. 193.
(6) 6 W. R. 818.
(7) 38 Law J. Rep. Q.B. 217; Law Rep. 4 Q.B. 351.
(8) 3 Mac. & G. 155; 20 Law J. Rep. Chanc. 217.
(9) 47 Law J. Rep. Q.B. 660; Law Rep. 3 Q.B. D. 446.
(10) 37 Law J. Rep. Exch. 177; 41 ibid. 137; Law Rep. 3 Exch. 306; ibid. 5 H.L. 418.
(11) 45 Law J. Rep. C.P. 861; Law Rep. 1 C.P. D. 402.
(12) 3 E. & B. 443; 23 Law J. Rep. Q.B. 185.

for lands injuriously affected, and prescribes that in that case a certain course shall be followed. That course, shortly stated, is this: if either party wishes to have the amount of compensation determined by arbitration, he may have it so done in precisely the same way as under the Public Health Act—that is to say, that if the parties cannot agree upon the nomination of one or more arbitrators, there may be two arbitrators, one to be nominated by each party; but if the person claiming compensation nominates an arbitrator, and the other party fails to nominate one on his side, then the single arbitrator nominated by the party making the claim is to be in the same position as if both parties had agreed to a sole arbitrator. That is exactly the mode of pursuing arbitrations provided by the Public Health Act. So far there is no difference whatever between the two Acts; and if the differences which there are in the phraseology are to be regarded as of any importance, I confess it seems to me that the argument in favour of the view presented by the appellants here would be very much stronger upon the phraseology of the Lands Clauses Act than it is upon the phraseology of the Public Health Act of 1875, because the whole of the compensation clauses of the Lands Clauses Consolidation Act are preceded by the words, "If any party shall be entitled to any compensation," and it might be very plausibly said that the proof of the title to compensation is a condition precedent to all the things which are to be done in order to ascertain the compensation to which the party is entitled; whereas here the Legislature has said, "Where any person sustains any damage by reason of the exercise of any of the powers of this Act in relation to any matter as to which he is not himself in default, full compensation shall be made to such person by the local authority exercising such powers, and any dispute as to the fact of damage or amount of compensation shall be settled by arbitration." Well, here at all events the right to compensation is introduced by reference not to a matter of law, the title to compensation, but to a matter of fact, the sustaining of damage, which matter of fact is most distinctly put within the power of the arbitrators, as well as the question of amount. Therefore it strikes me that this clause is worded in a manner much more unfavourable to the argument of the appellants than the Lands Clauses Act. No doubt there is this difference, pointed out on behalf of the appellants by their able counsel, that the Lands Clauses Act does not say that full compensation shall be made, and then go on to determine the way in which it is to be ascertained, but it treats the way in which it is to be ascertained as the mode of making compensation where the title to it does exist. Well, I agree that that is so; and if here any other mode of ascertaining the compensation had been provided, except that which in the immediate context of the same clause is provided, or if no mode at all had been provided, the observation would have had some force; but a mode is provided which is by arbitration, and the arbitration is to be upon "any dispute as to the fact of damage or amount of compensation."

Now, on ordinary principles of construction, laying aside entirely the prior authorities, I should have thought that it was quite plain there that two things were meant, at all events, to be the subject of enquiry by the arbitrators; the first "the fact of damage," the second the "amount of compensation" when damage there was. What is meant by "damage"? On common principles of construction it surely must mean that damage described in the words which immediately precede, and in respect of which alone compensation is to be made, "damage by reason of the exercise of any of the powers of this Act in relation to any matters as to which he is not himself in default." Those words are introduced as the foundation of the enquiry into the fact of damage, the fact of such damage as gives a right to compensation. That matter of fact no doubt cannot be ascertained without dealing with the actual state of facts, whatever it may be found to be; and that actual state of facts may possibly raise questions of law as to what is or is not done properly "in the exercise of any of the powers of the Act," and also as to what is and what is not a default on the part of the claimant. But the enquiry does not cease to be an

enquiry into the facts, though the facts may raise questions of law. If the arbitrator goes into the enquiry, as he ought, as a question of fact, and if he deals with the facts as he finds them, but deals with them in a wrong view of those facts according to law, then no doubt his award will not be final. If an action is brought upon it, and it appears that he has been mistaken in the view of the law which has governed his view of the facts, there will be a verdict for the defendants upon the award; but if he has not miscarried, the award certainly cannot be worse for his stating upon the face of it that he finds that state of facts into which by the express terms of the law he is bound to enquire, and which alone could give any right to compensation.

If, therefore, the case were entirely free from all authority, I should say that under the terms of this clause in this Act it was plain that, without paralysing altogether the whole provisions of the Legislature for the compensation of a person who had suffered damage, the course of proceeding was by arbitration, and then by bringing an action upon the award. That is the proper course; and what the learned Judge has found (and as far as I can understand he had reasonable ground for finding it) is that as a matter of fact, and as a matter of law also, the damage was sustained "by reason of the exercise of the powers of the Act." Well, I really do not know that under those circumstances your Lordships need go at much length into the examination of the authorities, some of which may probably have been determined at a time when the general law under the Lands Clauses Act was not so well settled as it is now. If we look at the series of cases beginning with the case of *The East and West India Dock Company* v. *Gattke* (8) before Lord Truro—which practically, though not in so many words, overruled the case of *The London and North Western Railway Company* v. *Smith* (5) before Lord Cottenham—if we begin with that case and follow the subsequent series of authorities, we find it perfectly settled that if an arbitration is insisted upon under the Lands Clauses Act, the company has no right to say that the arbitrator cannot go into the questions of which he is the proper judge because the company, plausibly or not, denies the right; and, on the other hand, that the company will not be prejudiced if it has good legal grounds for denying all liability, because the award will not be conclusive—an action may be brought upon it, and if it turns out that the law is in favour of the company, the company will have the benefit of it. That is perfectly decided under the Lands Clauses Act, and no question of this kind can be raised about it.

The cases which have been mentioned, the case of *The Queen* v. *The Metropolitan Commissioners of Sewers* (2) and the case of *The Queen* v. *The Burslem Local Board* (4), were not upon an Act containing this clause, or shewing so unequivocally as this does that something more than the mere question of the amount of compensation is to be determined. I rather prefer not expressing any opinion which I may have formed upon those cases. There is a good deal of difficulty, but I do not want unnecessarily to enter into a criticism of judgments upon a different Act of Parliament. They are undoubtedly judgments of Judges of very high authority; but I am bound to say as much as this, that as I read those judgments and what passed in the case of *Bradby* v. *The Southampton Local Board* (3), they seem to say that the mere denial of liability by the company is enough to suspend the right to proceed by way of arbitration. That is inconsistent with what has since been determined in the case of *Burgess* v. *The Northwich Local Board* (1), the whole proceeding in that case shewing that even where there was matter to be enquired into (as in that case there was), matter of law affecting the right and liability, the Court made that enquiry in an action brought upon the award, and did not find the award bad merely because that enquiry was one which it was necessary and proper to make. I do not know whether in that case the award was sustained or not; but it is perfectly clear that the award would have been sustained if the state of facts had been found to be such as Lord Justice Bowen found them to be in the present case.

Now that really is all which I feel it necessary to say. The conclusion to which I come is that the Court of Appeal has been entirely right, and that the appeal

ought to be dismissed with costs, and I move your Lordships accordingly.

LORD WATSON. — I am of the same opinion. Comparing the 308th section of the Public Health Act, 1875, with the 68th section of the Lands Clauses Act, 1845, I see no reason whatever for coming to the conclusion that a claimant under the one clause can be entitled to a remedy which is denied to a claimant under the other. The practice under the Act of 1845 has been authoritatively settled. I do not think that the same thing can be said of the practice following upon the Act of 1875. There are some decisions as to the procedure under the clauses of its predecessor, the Public Health Act of 1848; but even in regard to the construction of these there is no conclusive series of authorities.

I agree with the Lord Chancellor in thinking that the judgment under appeal ought to be affirmed, with costs.

LORD FITZGERALD.—The only difficulty which I have felt is in differing from the considered judgment of Lord Justice Bowen. I am, however, of opinion that the decision of the Court of Appeal was correct on the interpretation of the statute, and that even if the argument *ab inconvenienti* is applicable, the balance of convenience preponderates in favour of that decision.

It would certainly not be desirable or for the public interests that the received interpretation of the 68th section of the Lands Clauses Act, and the long settled practice thereunder, should be departed from in the construction of the 308th section of the Public Health Act, 1875. The two statutes are general enactments, each affecting the whole kingdom, and ought as to their arbitration clauses to receive the same interpretation, unless the differing language of the enactments forbids it. In my opinion there is no such difference of language or of subject as requires a different interpretation to be put on section 308 of the Public Health Act from that which has been established as the meaning of section 68 of the Lands Clauses Act.

Looking at the case as wholly governed by section 308 of the Public Health Act, it seems to me to be clear that it was open to the respondent (the plaintiff) to pursue the course of having the fact of damage and the amount of compensation settled in the first instance by arbitration. In establishing his case under that section the plaintiff had to sustain four propositions—namely, first, that he had sustained damage; secondly, that such damage had been occasioned by reason of the exercise by the local authority of the powers of the Act; thirdly, that such damage arose in relation to some matter as to which he was not himself in default; and, fourthly, the amount of compensation to which he was properly entitled. Any dispute as to propositions 1 and 4 is to be settled by arbitration. The fact of damage comes first in the section, and is the foundation of all the rest.

In the execution of his duties it is difficult to see how the arbitrator can avoid enquiring whether the acts complained of were matters done in the exercise of the powers of the Act, and as to which the claimant was not himself in default, so as to limit the scope of his assessment of compensation; but his decision, if any, as to the liability of the defendants in point of law would not be binding and would be inoperative. If the damage complained of has been occasioned apparently by reason of the exercise of the powers of the Act, the arbitrator proceeds to assess the amount of compensation limited to such damage, leaving it open to the defendants, if they think fit, to contest their liability to the amount awarded on any grounds that may be open to them.

The course pursued here seems to me to be a convenient one; the statute does not forbid it, nor is there anything to be found in its language which indicates that it should not be open to the party who alleges that he is injured to elect to have the compensation which he claims assessed in the first instance in the manner prescribed by the statute.

Order appealed from affirmed, and appeal dismissed, with costs.

Solicitors—Byrne & Lucas, agents for Homfray & Holberton, Brierley Hill, for appellants; Mackeson, Taylor & Arnould, agents for Joseph Higgs, Brierley Hill, for respondents.

1884.
Nov. 28.
Dec. 3.

PRICHARD *v.* PRICHARD.

Practice—New Trial—Action remitted to County Court—Mode of Appeal—Rules of the Supreme Court, 1883, *Order XXXIX. rules* 3 *and* 4; *Order LXXII. rule* 2.

Rules 3 *and* 4 *of Order XXXIX. of the Rules of the Supreme Court*, 1883, *have no application to motions for new trial in actions remitted to the County Court for trial under* 19 *&* 20 *Vict. c.* 108. *s.* 26.

In such actions a motion for new trial must still be made within the time limited by the old practice.

This was an action commenced in the High Court, but ordered to be remitted, after issue joined, for trial to the Pwllheli County Court, under the provisions of 19 & 20 Vict. c. 108. s. 26.

The case came on for trial before the Judge of the above County Court on the 19th of May, 1884, and a verdict was entered for the defendant. On the 26th of May, 1884, the plaintiff served the defendant with notice of motion, by way of appeal, to set aside the verdict in favour of the defendant and to have one entered for the plaintiff, or, in the alternative, for a new trial.

F. Marshall appeared for the plaintiff in support of the motion; but

J. Herbert Williams, for the defendant, took a preliminary objection.—This appeal is out of time (1). Order XXXIX. of the Rules of Court, 1883, has no application to actions remitted for trial in the County Court—*London* v. *Roffey* (2), approved of in *Davis* v. *Godbehere* (3). The decision in *Shapcott* v. *Chappell* (4) will probably be relied upon by the defendant; but that case has not been followed in a more recent case before the Court of Appeal—namely, *Mathews* v. *Ovey* (5). See also *The Swansea Co-operative Building Society* v. *Davies* (6). By virtue of Order LXXII. rule 2, the practice which prevailed before the Judicature Act is still in force; consequently the motion should have been made within the period prescribed by the old practice—that is, within four days from the trial—see rule 20, Hilary Term, 1853.

F. Marshall, contra.—The plaintiff was misled by the decision in *Shapcott* v. *Chappell* (4); the subsequent case of *Mathews* v. *Ovey* (5) not having been decided until the 9th of July, 1884. Moreover, it is contended that *Mathews* v. *Ovey* (5) is distinguishable; the action in that case having been commenced in the County Court—see also *Balmforth* v. *Pledge* (7).

Even if the Court should be of opinion that the provisions of Order XXXIX. rules 3 and 4 have no application to a case like the present, it is submitted that the Court has the power to, and will, under the special circumstances of this case, enlarge the time so as to admit of a rule *nisi* being moved for in accordance with the old practice.

Cur. adv. vult.

The following judgments were delivered on the 3rd of December:—

LORD COLERIDGE, C.J.—We took time to consider our judgment in this case, inasmuch as there are many others depending on it. Owing to a decision in this Court to the effect that the New Rules

(1) By Order XXXIX. rule 3 of the Rules of the Supreme Court, 1883, "Every application for a new trial shall be by notice of motion, and no rule *nisi*, order to shew cause, or formal proceeding other than such notice of motion shall be taken. By rule 4 the notice of motion shall be an eight days' notice, and shall be served within the times following—namely, if the trial has taken place in London or Middlesex, within eight days after the trial; if the trial has taken place elsewhere than in London or Middlesex, within seven days after the last day of sitting in the circuits for England and Wales during which the trial shall have taken place. The time of the vacations shall not be reckoned in the computation of the time for serving the notice of motion."

By Order LXXII. rule 2, "Where no other provision is made by the Act or these rules, the present procedure and practice remain in force."

(2) 47 Law J. Rep. Q.B. 16; Law Rep. 3 Q.B. D. 6.

(3) 48 Law J. Rep. Exch. 440; Law Rep. 4 Ex. D. 215.

(4) 53 Law J. Rep. Q.B. 77; Law Rep. 12 Q.B. D. 58.

(5) 53 Law J. Rep. Q.B. 439; Law Rep. 13 Q.B. D. 403.

(6) 53 Law J. Rep. M.C. 64; Law Rep. 12 Q.B. D. 21.

(7) 35 Law J. Rep. Q.B. 167; Law Rep. 1 Q.B. 428.

and the procedure under them applied to County Court actions, the present application has been made, and the action treated as if it were a High Court action. As regards the decision we came to in *Shapcott's Case* (4) it is sufficient for me to say that it has since been corrected by the Court of Appeal; and, upon more full investigation of the rules, I am satisfied that the decision of the Court of Appeal was right. Then, inasmuch as the procedure under Order XXXIX. does not apply to a case like the present, and no other procedure is provided, Order LXXII. rule 2 applies, and it follows that the procedure under the old practice still exists, being for the purpose of an action of this kind still preserved. Accordingly in this case the application is out of time, no application for a rule *nisi* having been made within four days from the date of the trial. But the practice is one which is governed by the authority of the Court; and although it ought not lightly to be disturbed, yet it is not an absolutely inflexible practice. There are authorities to shew that the time has been extended where gross injustice would follow from a refusal to extend the time—as, for instance, where through an honest mistake on the part of a suitor or counsel, an application was made in the Exchequer instead of the Common Pleas, and the motion which ought to have been made in the Common Pleas could not be made in time—see *Piggott* v. *Kemp* (8) and *Johnson* v. *Warwick* (9). In such a case the mistake has been rectified so as to prevent the working of an injustice. We think that these cases afford good ground for justifying the Court, under the special circumstances of this case, in enlarging the time so as to permit of a proper application being made. It must, however, be clearly understood that the old practice will be strictly adhered to in the future, unless, and until, it should be superseded by competent authority.

MATHEW, J.—I agree. It is clear that Order XXXIX. of the New Rules was not intended to apply to a case like this. The question before us, therefore, is as to what procedure applies. It appears to me that the only provision in the Rules of Court relating to this matter is to be found in Order LXXII. rule 2, which enacts that where no other provision is made by the Acts or the Rules the present procedure and practice remain in force. Now the old practice is contained in the Hilary Term Rules of 1853, and under them the application should have been made within four days by a rule *nisi*. At the same time these Rules of Hilary Term, 1853, have not, as was pointed out in *Rowberry* v. *Morgan* (10), the force and effect of an Act of Parliament; they were designed merely to promote the due administration of justice, and, like other rules of procedure, are subject to the control of the Court. Rules of this kind have sometimes been relaxed under particular circumstances where injustice would otherwise be done—see *The Queen* v. *Holt* (11) and *Newton* v. *Boodle* (12). In this case the plaintiff has clearly been misled as to the practice which prevailed, and has been guilty of no negligence; it seems to me, therefore, plain that this Court ought to rectify the mistake on his part by enlarging the time for moving under the rules of 1853.

SMITH, J.—I am of the same opinion. It seems clear, upon the authority of the *Swansea Co-operative Building Society* v. *Davies* (6) in this Court, and of *Mathews* v. *Ovey* (5) in the Court of Appeal, that Order XXXIX. does not apply to actions tried in the County Court. This application is, strictly speaking, therefore out of time; but, considering the very special circumstances which exist, it seems to me that the course pointed out by my Lord is the proper one to be adopted.

Order accordingly.

Solicitors—Chester & Co., agents for R. Ivor Parry, Pwllheli, for plaintiff; Simonds & Goolden, agents for Hughes and Pritchard, Bangor, and for Thomas Roberts, Portmadoc, for defendant.

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(8) 2 Dowl. & Ry. 20.
(9) 17 Com. B. Rep. 516 25 Law J. Rep. C.P. 102.
(10) 9 Exch. Rep. 730; 23 Law J. Rep. Exch. 191.
(11) 5 Term Rep. 436.
(12) 5 Dowl. & L. P.C. 664.

1884. June 26. *In the matter of an Interpleader Issue between* THOMPSON AND WRIGHT. RICHARDSON AND ANOTHER, *applicants.*

Interpleader—Indemnity—Order LVII. rule 2 (b).

Wright employed a firm of auctioneers to take and sell certain goods. The auctioneers advertised the goods for sale, whereupon Thompson gave notice to them that the goods belonged to him and that he should claim the proceeds. This notice the auctioneers transmitted to Wright, and he instructed them to proceed to sell, and gave them an indemnity. They accordingly sold the goods:—Held, *that the auctioneers had not, by taking the indemnity, disentitled themselves to relief under the Interpleader Acts.*

Tucker *v.* Morris (1 Cr. & M. 73; 2 Law J. Rep. Exch. 1) *and* Belcher *v.* Smith (9 Bing. 82; 1 Law J. Rep. C.P. 167) *distinguished.*

Appeal from the order of Denman, J., in chambers.

Wright was *cestui que trust* under a bill of sale, and Thompson was the trustee. Wright was in the possession of the bill of sale, and he directed Richardson & Roper, auctioneers, to take and sell the goods. The auctioneers took possession of the goods and advertised them for sale, whereupon Thompson gave notice to them that the goods belonged to him, and that he should hold them responsible and claim the proceeds. This notice the auctioneers transmitted to Wright, and he instructed them to proceed to sell, and gave them an indemnity. The auctioneers accordingly sold the goods, and on their application at chambers, Denman, J., ordered an interpleader issue between Wright and Thompson, to try the question whether the proceeds of the sale were the property of Thompson or Wright. From this decision Wright now appealed.

A. Charles, Q.C., and *Bryce*, for Wright, contended that by taking an indemnity the auctioneers had "colluded" with one of the claimants within the meaning of Order LVII. rule 2 (*b*), and had therefore disentitled themselves to relief under the Interpleader Acts; they cited *Tucker* v. *Morris* (1) and *Belcher* v. *Smith* (2).

R. Henn Collins, Q.C., and *English Harrison*, for Richardson & Roper, the auctioneers, contended that the objection could not be raised by the person who gave the indemnity, and that the auctioneers had not identified themselves with either of the parties as in the cases cited. Nor had they "colluded" within the meaning of Order LVII. rule 2 (*b*).

Holl, Q.C., and *H. A. Forman*, for Thompson, appeared in support of the order.

STEPHEN, J.—I am of opinion that this order must stand and the appeal be dismissed. The only question is whether by taking the indemnity the auctioneers have put themselves in a position from which the Court ought not to extricate them. The distinction between the present case and the authorities which have been cited is that in those cases the person who objected to the interpleader was not the party to the indemnity, whereas here the person objecting is the party who gave the indemnity.

In *Tucker* v. *Morris* (1) the person who claimed the relief had identified himself with one of the claimants to the property, but I fail in the present case to see that the act of taking the indemnity identified the auctioneers with the plaintiff so as to deprive them of the benefit of interpleader, and I think that they can properly claim to interplead. Circuity of action will thus be saved, for if no interpleader were granted the auctioneers would be sued by two persons at once, and the only defence to either would be the title of the other. I therefore think that the order was rightly made.

WILLIAMS, J. — I am of the same opinion. When the facts are ascertained, this seems to be a proper case for interpleader. Thompson adopts and ratifies the sale, and claims only the proceeds. The auctioneers are willing to pay the proceeds into Court, and apply to the Court for an interpleader issue to settle the controversy between Wright and Thompson. Thompson acquiesces in the

(1) 1 Cr. & M. 73; 2 Law J. Rep. Exch. 1.
(2) 9 Bing. 82; 1 Law J. Rep. C.P. 167.

Thompson and Wright.

application; but Wright objects, and disputes the right of the auctioneers to interplead, because, as he says, they are "colluding with one of the claimants" within the meaning of Order LVII. rule 2 (*b*). That rule is intended to provide against the case of a person who, professing to be impartial and a mere stakeholder, has, either through having made an admission or entered into a contract, hampered his position or identified himself with one of the parties, and then seeks to obtain the assistance of the Court to extricate him from his difficulty by making the parties litigate without reference to him. When the facts of this case come to be examined into, it seems to me that the real question in dispute will be properly decided in the issue between Wright and Thompson, and that the auctioneers have done nothing to deprive them of their right to relief by way of interpleader.

Appeal dismissed, with costs.

Solicitors—Sole, Turner & Knight, agents for W. C. Cripps & Son, Tunbridge, for applicants; J. Watson Stocker, for Thompson; Bellamy & Co., for Wright and others.

[IN THE COURT OF APPEAL.]

1884. Nov. 17, 18. } FEARON *v.* THE EARL OF AYLESFORD.*

Husband and Wife—Separation Deed—Covenant for Payment of Annuity—Covenant that Wife should not molest Husband—Independent Covenants—Molestation.

To an action by the wife's trustee in a separation deed against the husband for arrears of annuity covenanted to be paid by him, the defendant set up as an answer the breach of the trustee's covenant that his wife should not molest him; he further counter-claimed damages for molestation by her. The wife had been living during the separation in adultery, and had given birth to a child, of which the defendant was not the father; there was some evidence that the child whilst in its mother's house was called by the courtesy title borne by the eldest son of her husband, but there was no evidence that it was so called with her knowledge or consent:— Held, *that the two covenants were independent, and that molestation by the wife afforded no answer to the action for the arrears of annuity.* Held also, *that the fact of the wife living in adultery, even though coupled with that of having given birth to a bastard child, did not constitute molestation within the meaning of the covenant.* Held also, *that molestation must be an act done by the wife herself, or by an agent duly authorised by her to do it, and with the intention to annoy the husband.* Held also, *that if the wife caused the child to be called by her husband's name and second title, and held it out as being the huband's son and heir, that would amount to molestation.*

Cross-appeals from a decision of the Queen's Bench Division (reported 53 Law J. Rep. Q.B. 410).

Action by trustee for defendant's wife under a deed of separation to recover 475*l.*, arrears of an annuity which the defendant had covenanted to pay to the trustee for the wife. The deed also contained a further covenant that the wife should not molest the husband. There was also a counterclaim for damages for breach of the latter covenant.

At the trial it was admitted that the annuity had not been paid; but it was contended that there had been such a breach of the covenant not to molest on the part of the wife as to discharge the defendant from liability on the covenant to pay the annuity.

The evidence shewed that after the execution of the deed, and while the husband and wife were living apart, the latter was living in adultery and had given birth to a child, of whom the defendant was not the father. It was also proved that the child was called Lord Guernsey in the house where it lived with its mother; and it was alleged that it was so called with her consent and knowledge, and that by the use of this name, which is the courtesy

* *Coram* Brett, M.R., Cotton, L.J., and Lindley, L.J.

title borne by the eldest son of Lord Aylesford, she had held it out as being the son and heir of her husband.

The jury at the trial found as a fact that there had been a breach of the covenant against molestation, and assessed the damages on the counter claim at 100*l.*

Day, J., on further consideration, held that the molestation afforded an answer to the plaintiff's claim, because the two covenants were inter-dependent; and he gave judgment for the defendant upon the claim and also upon the counter-claim, but without damages.

The Queen's Bench Division (Denman, J., and Manisty, J.) held that, in the absence of any express provision in the deed making the performance of the covenant by the wife and her trustee a condition precedent to the payment of the annuity, the covenants were independent, and molestation by the wife afforded no answer to the action for the arrears; and, further, that the fact of the wife living in adultery, even coupled with that of her having given birth to a bastard child, did not constitute molestation.

Denman, J. (Manisty, J., *dubitante*), also held that if the wife caused the child to be called by her husband's name and second title, and held it out as being his son and heir, that would amount to molestation.

Judgment was given for the plaintiff on the claim, and for the defendant on the counter-claim.

Both the plaintiff and defendant appealed.

Waddy, Q.C., and *Francis Turner* (with them *E. F. Studd*), for the defendant, contended that there was evidence of molestation within the meaning of the covenant, and the learned Judge was right in leaving that evidence to the jury. The mere absence of the *dum casta* clause in a sepation deed does not allow the wife to commit adultery. There is an implied covenant on the part of the wife that she will live a chaste life. The interests of morality and public policy require that such a covenant should be implied; the deed must be taken to have been drawn upon the basis that that was the intention of the parties. The clause is not a usual clause in separation deeds—*Hart* v. *Hart* (1) and *Sullivan* v. *Sullivan* (2). A deed which has as its object an immoral purpose can undoubtedly be set aside—*Willyams* v. *Bullmore* (3). Where the wife lives an unchaste life there is the possibility of a suppositious child being put upon the husband; the insertion in a deed of a *dum casta* clause is therefore unnecessary—*Morrall* v. *Morrall* (4). *Gandy* v. *Gandy* (5) is really in the defendant's favour. The cases merely shew that adultery alone does not amount to molestation — *Scholey* v. *Goodman* (6), *Jee* v. *Thurlow* (7), *Thomas* v. *Everard* (8), *Goslin* v. *Clark* (9), and *Charlesworth* v. *Holt* (10).

[COTTON, L.J., referred to *Seagrave* v. *Seagrave* (11) and *Evans* v. *Carrington* (12).]

The question as to what amounts to molestation may be summed up as follows:—1. Adultery, and the publicity consequent thereon; 2. Adultery coupled with the birth of a child, so long as it lives; 3. Adultery not followed by the birth of a child if committed so as to become a matter of public notoriety; and, 4. Adultery coupled with the birth of a child and the holding it out as the legitimate child of the husband. There was evidence that the mother held out the child as the child of her husband.

Collins v. *Blantern* (13), *Grant* v. *Budd* (14), *Sanders* v. *Rodway* (15), *The Queen*

(1) 50 Law J. Rep. Chanc. 697; Law Rep. 18 Ch. D. 670, 675, 692.
(2) 2 Adam's Cons. Rep. at p. 303.
(3) 33 Law J. Rep. Chanc. 461.
(4) 50 Law J. Rep. P., D. & A. 62; Law Rep. 6 P. D. 98, 100.
(5) 51 Law J. Rep. P., D. & A 41; Law Rep. 7 P. D. 77, 168.
(6) 1 Bing. 349; 8 Moo. 350.
(7) 2 B. & C. 547, 552; 2 Law J. Rep. K.B. (o.s.) 81.
(8) 6 Hurl. & N. 453; 30 Law J. Rep. Exch. 214.
(9) 12 Com. B. Rep. N.S. 461; 31 Law J. Rep. C.P. 330.
(10) 43 Law J. Rep. Exch. 25; Law Rep. 9 Exch. 38.
(11) 13 Ves. 439.
(12) 1 Jo. & H. 598; 29 Law J. Rep. Chanc. 330.
(13) 1 Sm. L.C. 369 (7th ed.).
(14) 30 L.T. N.S. 319.
(15) 16 Beav. 207; 22 Law J. Rep. Chanc. 230.

v. *Duffield* (16), *Latham's Dictionary*, tit. "Molest," and *Ogilvie's Diction a* tit. "Molest," were also referred to.

Finlay, Q.C., and *R. O. B. Lane* were not called upon to argue.

BRETT, M.R. — I have carefully read the judgment of the Court below, and I agree in part and differ from part of it. I agree with the judgment so far as it holds that the covenant not to molest was no defence to the plaintiff's claim, and that he was entitled as trustee of the wife to recover the arrears of annuity. This was a separation deed; the husband and wife had had differences, the wife having been accused by her husband of having committed adultery. The husband had endeavoured to obtain a divorce, but failed, for reasons which it is not necessary to enter into, to obtain either that or a judicial separation. A separation was then carried out by means of the present deed, which contained a covenant in plain and simple words on the part of the husband to absolutely pay the annuity to the trustee for the wife during their joint lives. There was also a covenant on the part of the trustee of the wife that she should not molest her husband. It was contended on behalf of the defendant that it is a fundamental condition of such a deed that the wife should remain chaste after the separation, and that the act of committing adultery afterwards would *ipso facto* prevent her from insisting upon the deed or recovering any arrears of annuity. This contention was based upon the ground that it was required by public policy. I entirely agree with an observation of the late Master of the Rolls, that when two private individuals make a covenant in plain terms from which the only inference which can be drawn is that they intended what they said, it would be a most dangerous doctrine to introduce into the covenant, unless compelled by inevitable necessity, to do so, any term which it was known the parties would not themselves have introduced, upon the ground that unless they had intended to introduce such a clause the deed would be against public policy. If this point had been now raised for the first time I should absolutely refuse to say that the mere fact of a woman having fallen into this grave offence under peculiar circumstances, such as the neglect of her husband or any temptation, makes it against public policy—whatever may be the temptation to which the woman has succumbed—that the husband shall not be obliged to perform his covenant to pay the annuity. The point, however, has been decided the other way for more than two hundred years. If it were otherwise, the *dum casta* clause, which has been inserted in deeds by expert conveyancers up to the present day, would be an absolutely futile and senseless clause. Both upon authority and principle, therefore, it seems to me that there is no such doctrine. The fact that the wife has committed adultery is therefore no defence to the claim for arrears. It was then contended that the covenant to pay the annuity and the covenant not to molest were dependent covenants, and that the latter covenant amounted to a condition, so that if it were broken the other could not be enforced. But such deeds as these have been known in England for some two hundred years, and it has been decided over and over again that the two covenants are not so subservient to each other as to be reciprocal. The deed in the present case was drawn upon the faith of those decisions, which we cannot now overrule; and even if they had been wrongly decided, a deed so drawn must be construed as if they had been rightly decided. These two covenants are not therefore reciprocal, and the observance of the covenant not to molest is not a condition subsequent, a violation of which will operate so as to take away the effect of the independent covenant to pay the annuity. Even supposing that the covenant not to molest were broken, the defendant would not be relieved from liability upon the covenant to pay the annuity, but would be entitled to recover damages for the breach. With regard to the counter-claim, if it were shewn that the wife had molested the husband, the trustee would be liable in damages. The question therefore is, whether the wife has molested the husband. It was said that Lady Aylesford had done so by having committed adultery, and given birth to a child, which was in it-

(16) 5 Cox C.C. 404.

self an aggravation of the adultery, and amounted to a molestation, even though it were not proved that the child had been held out as the son of Lord Aylesford. It was also said that the fact of her having committed adultery under circumstances of public notoriety amounted to a molestation. But it is obvious that if adultery is not a molestation, the mere fact of her having subsequently given birth to a child would not convert the adultery into a molestation. The birth of a child is sometimes the result of adultery, but it is not, and cannot be, an act of the woman. In order to determine what is a molestation within the meaning of the covenant, it is not necessary to say what is its meaning according to the definition given in dictionaries. It must be an act done by the wife herself, or by an agent who is authorised by her to do it. It must be an act done with the intent to annoy, or an act done by her with the knowledge that it must of itself without more annoy the husband. Does the act of committing adultery come within either of these definitions? We must consider whether it is a true proposition to say that the mere fact of a woman committing adultery with another man at any time or interval of time, at any distance or under any circumstances, is an act done with the intent to annoy her husband. It would be contrary to truth to say so, for no thinking man would believe that she committed adultery with the intention of annoying her husband. She does it for other motives; and if from mere wickedness then it is an abominable act, but if from weakness and under grievous temptation then she is much to be pitied. As a rule, adultery is committed for the purpose of gratifying the passions. The act of adultery itself could not be said to annoy the husband; the utmost that could be said is that if it came to his knowledge subsequently it would annoy him. The question also whether the fact of the adultery being known to other persons would amount to an annoyance to the husband would depend upon whether they were likely to tell him of it. That therefore does not bring the case within either of the propositions which have been stated, and something more must be shewn in order to do so. The matter comes to this, that if a woman in such circumstances has a child which she knows is not her husband's child, and does that which intimates that she is putting it forward as his child, that would be strong evidence of an intention on her part to annoy him, especially if it would affect a legal claim to the title or property. Such an act would be strong evidence of an intent to molest the husband and of molestation within the meaning of the covenant. The question therefore is whether there was evidence on which the jury would be justified in finding that Lady Aylesford had so put the child forward to the world as Lord Guernsey, that the inevitable deduction to be made was that it was the son of Lord Aylesford, and whether the child was so put forward with the consent and by the authority of Lady Aylesford. There was some slight evidence that the child was called Lord Guernsey in its mother's house, and that the nurse said she so called it by the order of her mistress; but this was denied, and it is impossible to hold that it was evidence of Lady Aylesford having authorised any one to call the child by that name. So again the statements of the trustee as to what he would do or say with regard to the child are not evidence that the mother had authorised persons to call the child Lord Guernsey. It is clear beyond all doubt that there is no evidence that the child was called Lord Guernsey by the direction or authority of its mother. I think that if Lady Aylesford had held this child out as Lord Guernsey, that would be molestation within the meaning of the covenant; but there is no such evidence. Upon the whole I come to the conclusion that the plaintiff is entitled to succeed on the claim, and that the defendant has not made out his counter-claim.

COTTON, L.J.—I am of the same opinion. I think that there was no evidence to support the counter-claim, so that the point urged with regard to that is got rid of. As to the other point, there must be some act done by the wife. It is not sufficient to shew an act which caused annoyance to the husband. In my opinion one of the definitions given by the Master of the Rolls really involves the other. The act must be

done with the purpose and intent to annoy and injure the husband; and when an act is done the natural tendency of which is to annoy another, the person who does that act must be taken to intend to annoy. But when a person does an act the obvious consequence of which is that it could not have been done with the intent to annoy, but is referable to another intention, then the inference does not arise. The second head of the definition given by the Master of the Rolls is therefore involved in the first, if no other purpose can be referred to. We have here to say whether there was evidence of any acts done by Lady Aylesford with the intent to annoy her husband so as to be a breach of the covenant. I agree with the Master of the Rolls that if Lady Aylesford, knowing that this child was not her husband's child, had held him out as Lord Guernsey, that must be taken to have been done with the intention of annoying her husband. But there was no evidence to be left to the jury that she had in fact in any way so held him out, or had assented to his being so called. It cannot be said that the acts of adultery were breaches of the covenant not to molest. The adultery was not committed by Lady Aylesford for the purpose of annoying her husband, but for other motives—for the gratification of her passion or for love of another man. The birth of a child is not an act done by the wife: it is referable back to the adultery, which is not a molestation. It may be that the communication of the fact may be a molestation, but the adultery is not. The wife was living in adultery under an assumed name in Paris; but there is no evidence that she did so for the purpose of having the fact communicated to her husband.

Then we come to the clause which involves a question of general principle. It was said that under the circumstances the liability to pay the annuity ceased. The *dum casta* clause is one which is commonly inserted in separation deeds, and which provides that the annuity is to be payable only so long as the wife continues chaste. But it was said that the living a chaste life on the part of the wife ought to be considered as the foundation of the deed and as the implied intention of the parties. The parties here have omitted to make that provision; and there are cases, which I am not prepared to overrule, to the contrary. No doubt a deed which is framed with the object of allowing the woman to commit adultery, or which gives her licence to commit adultery, would be against public policy. But a *dum casta* clause merely provides that if the woman commits adultery the deed shall come to an end. I do not, however, think that public policy requires that a woman who commits an act of adultery is to be deprived of all means of subsistence and be made destitute. The covenant to pay the annuity is therefore good, and can be enforced.

LINDLEY, L.J.—I am of the same opinion. The first question, that the adultery of the wife does not afford a defence to an action for an annuity under a separation deed, seems to me to have been so well settled, for at least a hundred years, by authority that it would be wrong to decide otherwise. This may be seen by tracing the cases back from those of *Seagrave* v. *Seagrave* (11) and *Jee* v. *Thurlow* (7); but I am also aware of the authority in the Consistory Court—*Sullivan* v. *Sullivan* (2). The next question is, whether there was any breach of the covenant not to molest the husband. I do not profess to attempt to define the word "molest"; but I do not go the length of saying that there can be a molestation without the intention to molest. It is alleged that the wife has broken the covenant not to molest because she has allowed another man to commit adultery with her. But that cannot be regarded as molestation. If that fact does come to the knowledge of the husband, all the circumstances must be taken into account in order to determine whether it amounts to molestation. I cannot say that even the mere fact of adultery coupled with the birth of a child is molestation. It seems to me that to say so would be a straining of language. It was then said that there was evidence that Lady Aylesford passed the child off as Lord Guernsey. I think that, if she had done so, that would be molestation; but there was no evidence of this; the evidence which was given was of the most shadowy kind, and ought not to

have been left to the jury. The plaintiff is entitled to judgment on both the claim and counter-claim.

Judgment accordingly.

Solicitors—J. H. Lee, for plaintiff; G. E. Kaye & Co., for defendant.

[IN THE COURT OF APPEAL.]

1884. Aug. 5.

LEA *v.* PARKER.*

Practice—County Court—Visible Means—Security for Costs—Remitted Action— 30 *&* 31 *Vict. c.* 142. *s.* 10.

A plaintiff who has no such means of paying the costs of an action as can fairly be ascertained by a reasonable person in the position of the defendant, has no "visible means" within the meaning of section 10 *of the County Courts Act,* 1867.

The jurisdiction of the Judge to make an order under section 10 *only arises when an affidavit has been made by the defendant, and the Judge in exercising his discretion as to whether he will make an order or not must satisfy himself whether the plaintiff has any means of paying the costs of the action, and not merely whether he has any "visible means."*

Counsel *v.* Garvie (Ir. Rep. 5 C.L. 74) *commented on.*

Appeal by the defendant from a judgment of the Queen's Bench Division.

The action was brought against the defendant, a sheriff's officer, to recover damages for wrongfully breaking and entering the plaintiff's house and for conversion. The defendant made an application to the District Registrar at Liverpool for an order under 30 & 31 Vict. c. 142. s. 10, that unless the plaintiff should give security for the costs of the action, the action should be remitted for trial to the County Court.

It appeared from the affidavit made by the defendant that he had made enquiries as to the plaintiff's means, and believed that the only property which the plaintiff possessed consisted of a joint share in a leasehold colliery and coal-yard; that there was a person in possession of both the colliery and coal-yard under a claim for rent for two sums of 4,967*l.* and 962*l.*; that the defendant held a warrant to levy 2,404*l.* against the plaintiff and his brother, but he could not execute it as the plaintiff had no property on which to levy; that all the plaintiff's furniture had been sold under an execution, and his property assigned for the benefit of his creditors; and the defendant stated that he believed that under these circumstances the plaintiff had no means at all.

The District Registrar on the 22nd of April, 1884, made the order asked for, but granted leave to the plaintiff to apply to discharge it if he obtained an appointment which he stated he expected to get, before the cause was remitted to the County Court. The Registrar subsequently, on the 24th of May, 1884, rescinded the order, the plaintiff having obtained a situation under an agreement as colliery manager for two years; the employment being determinable by three months' notice, or on payment of three months' salary in lieu of notice, or without notice in the event of wilful misconduct.

Denman, J., at chambers, rescinded the last order of the Registrar upon the ground that at the time when it was made the plaintiff had no visible means.

The Queen's Bench Division (Field, J., Manisty, J., and Lopes, J.) reversed the decision of the Judge.

The defendant appealed.

Forbes Lankester (*W. R. Kennedy* with him), for the defendant.—The question is whether the plaintiff, upon the facts stated in the affidavit, had "visible means" within the meaning of 30 & 31 Vict. c. 142. s. 10. In *Counsel* v. *Garvie* (1) Whiteside, C.J., was of opinion that the term "visible means" meant "tangible means"—properties which the defendant could reach to pay his costs in the event

* *Coram* Brett, M.R., Bowen, L.J., and Fry, L.J.

(1) Ir. Rep. 5 C.L. 74, 77.

of his obtaining a verdict; and that it could not be contended that if a man has an office to which a salary is attached he is possessed of no tangible means because the property is not visible to the eye. But visible means can only mean property available for execution; the right to receive a salary *in futuro* is not "visible means," for the salary cannot be attached —*Webb* v. *Stenton* (2). A debt can be attached, but the salary payable *in futuro* is not a debt due. *Gordon* v. *Jennings* (3) is therefore distinguishable. Inasmuch as there are other judgments outstanding against the plaintiff, security for costs should be ordered even if the salary can be attached.

Emden, for the plaintiff.—A salary of 200*l.* a year constitutes "visible means" within the meaning of the section. The plaintiff is therefore justified in bringing the action in the superior Court, and ought not to be ordered to give security. A salary is a debt, and can therefore be attached—*Tapp* v. *Jones* (4)—so that *Counsel* v. *Garvie* (1) is an authority in favour of the plaintiff.

BRETT, M.R.—In this case all the facts were not brought to the attention of the Court below. The question turns upon the meaning of section 10 of 30 & 31 Vict. c. 142, which must be construed according to its plain language. By that section, any person against whom any of the specified actions is brought in a superior Court may make an affidavit that the plaintiff has no visible means of paying the defendant's costs should a verdict not be found for the plaintiff. That part of the section is applicable to the affidavit which may be made by the defendant, and directs him as to the circumstances under which such an affidavit may be made—namely, that the plaintiff has no visible means. I think that the section so far means that the defendant must make an affidavit that to him and to any reasonable person in his position the plaintiff has not any means which are visible; or, in other words, that the circumstances are such that any fair and reasonable man may make an affidavit that the plaintiff has no means which can be seen, and that a person in the position of the defendant could not fairly suppose that the plaintiff had any—for unless that could be said such an affidavit ought not to be made. If the defendant knew that the plaintiff had means, but nevertheless made the affidavit, he would be making a false affidavit. The section so far applies to the defendant. Then we come to those words which are applicable to the Judge: "thereupon"—that is, upon the defendant making such an affidavit—"a Judge of the Court in which the action is brought shall have power to make an order that unless the plaintiff shall, within a time to be therein mentioned, give full security for the defendant's costs to the satisfaction of one of the Masters of the said Court, or satisfy the Judge that he has a cause of action fit to be prosecuted in the superior Court, all proceedings in the action shall be stayed; or, in the event of the plaintiff being unable or unwilling to give such security, or failing to satisfy the Judge as aforesaid, that the cause be remitted for trial before a County Court to be therein named." That part of the section gives the Judge jurisdiction to make the order; but it does not say that he is to make it. It is clear that he has a judicial discretion whether he will make it or not. This jurisdiction is given to the Judge by the affidavit whether it be true or false. How ought the Judge to exercise his discretion? The defendant states in the affidavit that the plaintiff has no visible means; and the question, when it comes to the Judge, seems to be whether the plaintiff has any means, and not whether he has only visible means. If it were clear that the defendant would be justified in saying that no reasonable person could say that the plaintiff had any means at all, then the plaintiff could not be said to have "visible" means within the meaning of the section. But if the plaintiff can shew the Judge that he has ample means, or if he can shew that he has means, then the only way in which the Judge, although he has jurisdiction, can exercise a judicial discretion, would be

(2) 52 Law J. Rep. Q.B. 584; Law Rep. 11 Q.B. D. 518.
(3) 51 Law J. Rep. Q.B. 417; Law Rep. 9 Q.B. D. 45.
(4) 44 Law J. Rep. Q.B. 127; Law Rep 10 Q.B. D. 591.

to say that the plaintiff ought to be allowed to sue in the superior Court. In such a case there would be no reason for an order being made that the plaintiff should give security, or, in the alternative, that the action should be sent down for trial to the County Court. If the Judge were so to exercise his discretion, it would be such a wrong exercise of it as to be a matter of appeal. But if the Judge is satisfied that the plaintiff has no means at all, it would be a wrong exercise of his discretion to allow the plaintiff to proceed with the action in the superior Court. If, however, the matter is doubtful, the discretion of the Judge, if exercised, ought not to be interfered with. We must therefore see how, upon the facts, the discretion of the Judge ought to have been exercised. The only means which the plaintiff had was under a contract whereby he received a salary of 4*l.* a week. But the fact must be added that judgments have been obtained against him to the extent of several thousand pounds; and an attempt made to put in force an execution under a judgment was met by proof that he had no means whatever, and that there was nothing upon which the execution could be levied. The salary is either not attachable at all, or if it is, then the plaintiff's other creditors, being in a position to do so, are entitled to attach it as soon as, if not sooner than, the defendant can. I do not think that the test is whether the salary is attachable or not. A man might be in a position to pay the costs of an action although he has not got anything upon which execution could be levied. If, however, the salary is not attachable, the utmost that could be done would be to make an order that the plaintiff should pay the costs by instalments; and such an order might also be obtained by the other creditors. It is therefore clear that the plaintiff, if the verdict should be against him, has no means of paying the defendant's costs. The only way in which the Judge could exercise his discretion under the circumstances was by an order that the plaintiff give security; or, in the alternative, the action be remitted for trial to the County Court. I do not agree with the test suggested by Whiteside, C.J., in *Counsel* v. *Garvie* (1) that the "means" must be "tangible" means, or property which could be made available for the purposes of execution or attachment. It seems to me that that is too narrow a meaning to put upon the word.

BOWEN, L.J.—I am of the same opinion. I think that the circumstances of the case which induce us to differ from the Court below were not apparently pressed upon the Judges. The facts, when once understood, put the plaintiff out of Court; whatever meaning is to be put upon the term "visible means," or whatever is supposed to be a condition precedent to the exercise of the discretion by the Judge, a person who has no substantial means of paying costs has no "visible means" of paying the costs within the meaning of the section, for he has no means at all. The plaintiff here has clearly no substantial means of paying the costs. Section 10 was intended to enable a person who is threatened with litigation by an apparent pauper to drive his antagonist to the County Court. This is effected by means of an application at chambers for an order that "unless the plaintiff shall give full security for the defendant's costs, or satisfy the Judge that he has a cause fit to be prosecuted in a superior Court, all proceedings in the action shall be stayed; or in the event of the plaintiff being unable or unwilling to give such security, or failing to satisfy the Judge as aforesaid, the cause be remitted for trial to a County Court;" but it is a condition precedent to the order being made that the defendant should make an affidavit—which, however, is not to be that the plaintiff has no means, for the section is not so unreasonable as to throw upon the defendant, who has not the best means of knowing, the onus of swearing as to the actual means of another. In order to found the jurisdiction of the Judge the defendant has only to make an affidavit that the plaintiff has no "visible means"—that is, no means which are apparent or which can reasonably be ascertained of paying the costs of the action. The word "visible" is used because the defendant has to make the allegation in his affidavit. It is inserted in order to enable him to limit and qualify that which he swears as to a matter

which is not within his own knowledge; and it limits it to what may be apparent to him on exercising reasonable means of enquiry. As soon as the affidavit is made, the jurisdiction of the Judge arises; and he has power, provided that he is satisfied that the plaintiff has not got a cause of action fit to be prosecuted in a superior Court, or that the plaintiff is unable or unwilling to give security, to make the order under the section. That is a power to be exercised according to the discretion of the Judge. How ought that discretion to be exercised? The first question is whether the affidavit which alleges that the plaintiff has no visible means satisfies the Judge—not that the plaintiff has no visible means, but that he has no means. It is not necessary that the Judge should be satisfied that the allegation by the defendant that the plaintiff has no visible means is absolutely true, but that it was probably true; and as soon as he makes up his mind that the affidavit is fair and reasonable, and that the means of the plaintiff are not such as to make it reasonable to refuse the order, then he makes the order. It is not necessary to hold that the means must be equivalent to tangible means; they are means of paying the costs of the action, but not of paying the costs in a particular way. That being the construction of the section, it is clear that the case falls within it. Even if the case came within the narrow construction placed upon the term "visible means" by Chief Justice Whiteside in *Counsel* v. *Garvie* (1), the plaintiff here has no substantial means of paying the costs of the action.

FRY, L.J.—I concur in the conclusions which have been arrived at by the other members of the Court. It appears to me that the meaning of the words "visible means" is not that which was put upon them by Chief Justice Whiteside in *Counsel* v. *Garvie* (1), but is that which has been expressed by the Master of the Rolls and Lord Justice Bowen. The words refer to means of paying the costs which are visible to the bodily or mental eye of an attentive observer—means of payment which the person who makes the affidavit can fairly ascertain. It appears to me in the present case that the statements of the defendant when the affidavit was made were perfectly true, and that the plaintiff had no means, either visible or invisible, of paying the costs, so that the contingency upon which the discretion of the Judge depended was amply made out. Then comes the question whether the Judge rightly exercised his discretion in making the order. Under the circumstances of the case it seems to me that the plaintiff was clearly without the means of paying the costs of the action. The appeal must therefore be allowed.

Appeal allowed.

Solicitors—T. Cray, agent for H. Davies, Liverpool, for plaintiff; Burton & Co., agents for Tyrer, Kenion, Tyrer & Simpson, Liverpool, for defendant.

[IN THE COURT OF APPEAL.]

1884. Dec. 3. MCILLWRAITH AND OTHERS *v.* R. AND H. GREEN.*

Practice — Payment into Court with Denial of Liability — Discontinuance — Taxation of Costs—Rules of Court, 1883, *Order XXII. rules* 6 *and* 7; *Order XXVI. rule* 1.

In an action for breach of contract, in which the plaintiffs alleged several distinct breaches, the defendants, while denying all liability, paid into Court in the alternative a sum by way of satisfaction of one alleged breach. The plaintiffs took out the sum so paid in, and gave notice that they accepted the same in full satisfaction of the causes of action in the statement of claim mentioned:—Held, *that what the plaintiffs had done was equivalent to a discontinuance, that they were entitled to tax their costs under Order XXII. rule* 7, *and that it was not necessary for them also to give notice of discontinuance under Order XXVI. rule* 1.

Appeal by the defendants from the judgment of the Queen's Bench Division.

Action against shipbuilders for breach of contract to build certain iron barges.

The statement of claim alleged several

* *Coram* Brett, M.R., and Lindley, L.J.

distinct breaches, and, amongst others, alleged that certain iron plates which had been used by the defendants in the construction of the barges were thinner than was provided for by the specification. Full particulars of the alleged breaches were delivered by the plaintiffs.

The defendants by their statement of defence denied all the alleged breaches, but with regard to the iron plates they pleaded in the alternative that if they were thinner than was provided for in the contract, which the defendants denied, the plaintiffs had not thereby sustained damage to an amount exceeding 175*l.*, which sum the defendants paid into Court.

The plaintiffs took out the money so paid in, and gave notice that they accepted the same in full satisfaction of the causes of action in the statement of claim mentioned. The plaintiffs then applied for an order for taxation of their costs, which the Judge at chambers refused to grant; but the Queen's Bench Division, on appeal, set aside his order.

The defendants appealed.

Finlay, Q.C., and *Bucknill*, for the defendants.—This appeal raises the question whether a plaintiff can tax his costs when he has taken out money paid in as to one cause of action, there being other causes of action, when the defendant denies his liability in respect of all the causes of action and has only paid in money in the alternative for the sake of peace. Order XXII. rule 6 provides that "when the liability of the defendant in respect of the claim or cause of action in satisfaction of which the payment into Court has been made is denied in the defence" the plaintiff may accept the sum so paid in, "whereupon all further proceedings in respect of such claim or cause of action, except as to costs, shall be stayed"; and that is the rule which applies to the present case, so that there is no stay as to costs. The plaintiffs have attempted to proceed under rule 7 of Order XXII., which applies to payment into Court made before delivery of defence, and does not apply to such a case as the present, because payment into Court with a denial of liability does not satisfy the provisions of rule 7—*Crosland* v. *Routledge* (1). The plaintiffs should have given notice of discontinuance under Order XXVI. rule 1.

J. Moulton, for the plaintiffs.—There is but one cause of action, although several breaches are alleged. The plaintiffs have a right under Order XXII. rule 7 to tax their costs, for they have accepted the payment into Court in satisfaction of their claim, and it is for the Taxing Master to apportion the costs. It is not necessary for the plaintiffs to give any further formal notice of discontinuance.

BRETT, M.R.—In this case the plaintiffs brought an action in which they alleged that there had been several distinct breaches of one contract. The defendants in their statement of defence denied their liability, but in the alternative they paid with regard to one particular alleged breach a sum of money into Court, expressing in the statement of defence that they paid the money in to meet one separate and distinct breach. The plaintiffs accepted this sum so paid in in respect of one distinct breach, and they took it out in satisfaction of all the breaches of contract which they had alleged in their statement of claim.

It seems to me that this case is really the same as though the plaintiffs had brought their action for several distinct causes of action, and as though the defendants had denied their liability in respect of all those causes of action, but had at the same time paid money into Court explicitly as to one of the causes of action, and as though the plaintiffs had then said that they accepted the money so paid in in satisfaction of all the causes of action.

It has been urged that the course which the plaintiffs took in this case and the notice which they gave is equivalent to a notice by them that they accepted the money so paid as paid in respect of the cause of action or breach to meet which it was paid in, and, further, as equivalent to a notice that they did not intend to proceed with the other causes of action or on the other alleged breaches of contract. But it is said on the other side that what the plaintiffs have done is not equivalent to this, that they ought to have taken other steps, and that they ought to have given a notice of discontinuance pursuant to Order XXVI. rule 1. I am of opinion that

(1) Weekly Notes, 1883, p. 228.

what the plaintiffs have done in this case does amount to a discontinuance, and that where a plaintiff brings an action for several causes of action, which may be entitled, for example, A, B, and C, and money is paid in by the defendant in respect of A, then if the plaintiff accepts that money, as he has done here, "in full satisfaction of the causes of action in the claim mentioned," he really discontinues his action in respect of all the three causes of action A, B, and C, and that he is not obliged to take other steps or to give any further notice. I agree, therefore, with the judgment of the Queen's Bench Division; and if it is supposed that Field, J., has taken a different view in a case brought before him at chambers, then I cannot agree with that view.

In such a case, therefore, the Master will tax the costs on the footing that there has been an acceptance and discontinuance. The plaintiff will in such a case get the general costs of the action, but he will not get the costs of all the particulars, or of that part of the statement of claim which relates to the causes of action which he has thus abandoned; and if the defendant has been put to expenses by reason of such or of the voluminous nature of the pleading, then the plaintiff will have to pay those expenses to him.

LINDLEY, L J.—I am of the same opinion. This is a case in which the plaintiffs do not desire to go on with the action; they have accepted the money paid in to one breach in full satisfaction of all the causes of action mentioned in their statement of claim. That is substantially a discontinuance and an abandonment of the other causes of action, so that they are entitled to have their costs taxed on the footing that they have discontinued their action in respect of those causes of action.

Appeal dismissed.

Solicitors—Davidson & Morriss, for plaintiffs; Stokes, Saunders & Stokes, for defendants.

BANKRUPTCY.
1884.
Nov. 24.
Dec. 3.

In re HALL; *ex parte* CLOSE.

Bill of Sale—Registration—Pledge—Immediate Transfer of Possession—Transfer in ordinary course of business—Bills of Sale Acts, 1878 *and* 1882, 41 *&* 42 *Vict. c.* 31, *and* 45 *&* 46 *Vict. c.* 43.

A document accompanying a transaction by way of deposit or pledge of personal chattels, the object and effect of which is to transfer the immediate possession of the chattels from the grantor to the grantee, is not a bill of sale within the operation of the Bills of Sale Acts, 1878 *and* 1882.

Quære, *whether a pledge by a trader of stock-in-trade, which he has bought on credit and not paid for, is a "transfer of goods in the ordinary course of business of any trade or calling," within the meaning of that expression in the Bills of Sale Act*, 1878, *s.* 4.

Reeves *v.* Barlow (53 Law J. Rep. Q.B. 192; Law Rep. 12 Q.B. D. 436) *explained.*

This was an appeal by the trustee from a decision of the Judge of the Leeds County Court, whereby the learned Judge refused an application on the part of the appellant for an order that a memorandum of agreement dated the 13th of November, 1882, and a delivery order for goods made in pursuance thereof, was void against the appellant, and for an order directing the respondents, the Exchange and Discount Bank, Limited, to deliver the said goods to the appellant.

The facts are fully set forth in the judgment.

Willis, Q.C., and *West*, for the trustee, the appellant.—The memorandum of the 13th of November, 1882, is a bill of sale, and is not registered. The transaction is not a "transfer of goods in the ordinary course of business of any trade or calling" within the meaning of the exception in section 4 of the Bills of Sale Act, 1878. The "ordinary course of business, &c.," is that which a man can reasonably do in carrying out his business. It may be said that the transaction is within the "ordinary course" of a banker's business; but it is contended

that the expression must mean the "ordinary course of business" of both parties to the transaction, for it would be absurd if the transaction might be legal on one side and illegal on the other. It cannot be maintained that the transaction here was within the "ordinary course" of the debtor's business.—They referred to the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 11, sub-s. 5.

The memorandum of the 13th of November, 1882, was an agreement by which a right in equity to any personal chattels was conferred within the meaning of section 4 of the Bills of Sale Act, 1878; the bank had a right over the property for an antecedent debt and present advance.

Linklater and *E. Tindal Atkinson*, for the Exchange and Discount Bank, Limited, the respondents.—The Bills of Sale Acts, 1878 and 1882, do not apply where the goods are not left in the possession of the person obtaining the advance. The memorandum of the 13th of November, 1882, was merely a defeasance—*Ex parte The North Western Bank; in re Slee* (1). The preamble of the Bills of Sale Act, 1878, shews that the Act is directed to secret bills of sale. There is no new definition of "bill of sale" in the Bills of Sale Act, 1882. The memorandum does not profess to transfer the property.—They referred to *Woodgate* v. *Godfrey* (2), *Marsden* v. *Meadows* (3), *In re Baum; ex parte Cooper* (4), *Ex parte Odell; in re Walden* (5).

Willis, Q.C., in reply, cited *Reeves* v. *Barlow* (6), *per* Smith, J.

Cur. adv. vult.

CAVE, J. (on Dec. 3).—This is an appeal against a judgment of the County Court Judge at Leeds refusing to make an order on the respondents to pay to the trustee the proceeds of the sale of some leather.

Hall was formerly a boot and shoe manufacturer, and had a banking account with the Exchange and Discount Bank at Leeds. In November, 1882, this account was considerably overdrawn, and Hall, who stood in need of further assistance, applied to the bank to allow him to increase his overdraft on the security of some leather which he had just purchased of Hugh Brown & Son of Liverpool and which he was to pay for by bills. Hall shewed the invoice of the leather to the bank manager, who was, I have no doubt, aware of the terms of the purchase. It was arranged that the bank should make an advance of 500*l.* upon the leather on a separate special account, and that the leather was not to be redeemed until Hall had not only paid back the 500*l.*, but also reduced his overdrawn account within an agreed limit. When this arrangement was entered into the leather was on its way from Liverpool to Leeds, consigned to Hall's order; and Hall, by a transfer order directed to the Great Northern Railway Company, and dated the 9th of November, 1882, directed them to transfer the leather to the order of the Exchange and Discount Bank. This letter was sent by the bank manager to the Great Northern Railway Company, who, on the 10th of November, sent the bank an advice note of part of the leather, stating that it was held to the order of the bank, and on the 13th of November sent a similar advice note in respect of the remainder of the leather. On the same day the bank manager wrote to the railway company stating that he had advanced money against the leather, and requesting them to note that no lien could be placed against it except for warehouse rent. On the same day a minute was entered in the bank ledger and signed by the debtor as follows:—

"November 13th, 1882.

"Special account.—To have 500*l.* against goods represented in H. Brown & Son's invoice, 8th of November, for 951*l.* 15*s.* 10*d.*, to be repaid 100*l.* per week; first payment to be made on the 22nd of November, 1882; and upon the whole amount and expenses being repaid, even if in a shorter time, the leather to be released, provided the regular current account is in order. Terms:—Interest one per cent. above bank

(1) 41 Law J. Rep. Bankr. 72; Law Rep. 15 Eq. 69.
(2) 49 Law J. Rep. Exch. 1; Law Rep. 5 Ex. D. 24.
(3) 50 Law J. Rep. Q.B. 536; Law Rep. 7 Q.B. D. 80.
(4) 48 Law J. Rep. Bankr. 40; Law Rep. 10 Ch. D. 313.
(5) 48 Law J. Rep. Bankr. 1; Law Rep. 10 Ch. D. 76.
(6) Law Rep. 11 Q.B. D. 610; on appeal, 53 Law J. Rep. Q.B. 192; Law Rep. 12 Q.B. D. 436.

rate not falling below five per cent., and commission one half the amount of interest.

W. Hall."

This minute was entered in the margin of a new account which the bank opened with the debtor, and thereupon the debtor obtained the agreed advance of 500*l.* At the date of the debtor's petition (7) he had not discharged his liability to the bank upon the special account, and the regular current account was overdrawn beyond the agreed amount to an extent considerably exceeding the value of the leather.

The bank have since sold the leather for the net sum of 812*l.* 1*s.*, and the trustee applied to the County Court Judge for an order on the bank to pay over to him that sum, which order the Judge refused to make.

For the trustee it was contended that the minute of November the 13th, 1882, was a bill of sale within the Act, 1882, and void because it was not in the form required by that Act and not registered.

The substantial question is whether the Bills of Sale Act, 1882, applies to documents regulating the rights and liabilities of pledgor and pledgee, or is confined to cases where the possession of the goods dealt with by the bill of sale is intended to continue for some time at all events in the grantor.

The Act of 1854 recites that frauds are frequently committed upon creditors by secret bills of sale of personal chattels, whereby persons are enabled to keep up the appearance of being in good circumstances and possessed of property, and the grantees or holders of such bills of sale have the power of taking possession of the property of such persons to the exclusion of the rest of their creditors. The mischief here pointed at is the false appearance of credit arising from the possession, and so apparent ownership, of property which the grantee of a bill of sale is really entitled to, and of which he has the power of taking possession. This is not the mischief which arises from a pledge, for in that case the possession being transferred to the pledgee, the pledgor cannot get false credit from an apparent possession giving rise to a false notion of ownership.

(7) 30th November, 1882.

The 1st section enacts that every bill of sale of personal chattels made after the passing of this Act, either absolutely or conditionally, or subject or not subject to any trusts, and whereby the grantee or holder shall have power either with or without notice, and either immediately after the making of such bill of sale, or at any future time, to seize or take possession of any property and effects comprised in or made subject to such bill of sale, shall be filed, &c. Here it is to be observed that the section does not include all bills of sale, but only bills of sale whereby the grantee or holder shall have power to seize or take possession of any property comprised in the bill of sale.

Now, in the case of a pledge, the essence of the transaction is that the possession is transferred at once, and the document regulating the rights and liabilities of the pledgee does not, and cannot, give him power to seize or take possession of the property pledged, because it is of the essence of the transaction that the pledgee shall have the possession, and if he does not get possession there is no pledge.

Section 7 defines the meaning of the expression "bill of sale." But whatever documents are included by the definition within that expression they must still, by force of the 1st section, be documents whereby the grantee or holder shall have power to seize or take possession of the property comprised in or made subject to the document.

This Act has been repealed, as to bills of sale executed subsequently to the 1st of January, 1879, by the Act of 1878. This Act simply recites that it is expedient to consolidate and amend the law relating to bills of sale of personal chattels; and section 3 enacts that the Act shall apply to every bill of sale executed on or after the 1st of January, 1879, "whereby the holder or grantee has power to seize or take possession of any personal chattels comprised in, or made subject to, such bill of sale." These words are to the same effect as those used in the 1st section of the Act of 1854, and cannot be widened by the definition contained in the 4th section.

The Act of 1882 applies only to bills of sale given by way of security for the payment of money; but, subject to the excep-

tion thus created, the expression "bill of sale" has the same meaning in the Act of 1882 as in that of 1878.

Section 7 provides that personal chattels assigned under a bill of sale shall not be liable to be seized or taken possession of by the grantee for any other than the causes therein specified.

By section 9 the bill is to be void unless made in accordance with the form in the schedule, which contains a proviso that the chattels thereby assigned shall not be liable to seizure or to be taken possession of by the grantee for any cause other than those specified in the 7th section of the Act.

There is very little authority on the subject. In *Ex parte The North Western Bank* (1) there is an *obiter dictum* of Chief Judge Bacon that a letter of hypothecation was not a bill of sale within the Act of 1854. In *Marsden* v. *Meadows* (3) Lord Bramwell, then Lord Justice Bramwell, says, "The Legislature has thought it right to say as against certain persons, such as execution creditors and trustees in bankruptcy, when it is attempted to separate the ownership of goods from the possession of them, a bill of sale shall be invalid unless it has been registered." *Reeves* v. *Barlow* (6) was also cited. In that case it was held that an agreement by a clause in a building contract that all building and other materials brought by the builder upon the land where the house was to be built should become the property of the landowner was not a bill of sale. The *ratio decidendi* there appears to be that if such building agreements were within the Act of 1878 they were so only on grounds which would have brought them within the Act of 1854; that they had been held not to be within the Act of 1854 by decisions of great weight which the Court of Appeal was not prepared to review; and consequently, in the absence of any words in the Act of 1878 shewing that a change of the law was intended, that they must be held not to be within that Act also. But this only shews that such clauses in building agreements are *sui generis*, and throws no light on the present question.

Apart, however, from authority, I am satisfied, on the construction of the Bills of Sale Acts, that they do not include letters of hypothecation accompanying a deposit of goods by merchants or factors, or pawntickets given by pawnbrokers, or in fact any case where the object and effect of the transaction are immediately to transfer the possession from the grantor to the grantee.

In this case there was an actual transfer of possession of the leather by virtue of the transfer order sent by Hall to the railway company, and of the advice notes sent by the railway company to the bank by which they undertook to hold the leather to the order of the bank; and although I am of opinion that the minute of the 13th of November was intended to be a partial record of the transaction, I hold that the transaction itself was not one of those to which the Act of 1882 applies; and consequently that the minute of the 13th of November was not required to be in the form given in the schedule to the Act or to be registered.

This view renders it unnecessary that I should deal with the other points raised by Mr. Linklater on behalf of the bank; but it must not be taken that I can at all assent to his proposition, that a pledge by a trustee of stock-in-trade which he has bought on credit and not paid for, is a transfer in the ordinary course of business of his trade or calling.

The judgment of the learned County Court Judge must be affirmed, with costs.

Order accordingly.

Solicitors—Bell, Brodrick & Gray, agents for Walker & Tweedale, Leeds, for the trustee; Torr & Co., agents for Cousins & Cousins, Leeds, for the Exchange and Discount Bank (Limited).

[IN THE COURT OF APPEAL.]

1884. Nov. 7, 8. } TODD *v.* ROBINSON.*

Public Health Act, 1875 (38 & 39 *Vict.* c. 55), *s.* 193 — *Penal Action — Officer of Board — "Interested in" a Contract — —Shareholder in Contracting Company.*

A clerk to a district local board under the Public Health Act, 1875, *who is a shareholder in a gas company which supplies gas in the district at so much a lamp paid by the local board pursuant to a resolution of the board, is an officer "interested in" a contract made with the board for the purposes of the Act, and is liable to penalties under section* 193 *of the Act.*

Appeal against the decision of Field, J., at the trial, on the 18th of January, 1884, at Newcastle, without a jury, whereby judgment was entered for the plaintiff for 50*l.*, with costs.

The action was brought for penalties under section 193 of the Public Health Act, 1875.

The defendant, in July and August, 1882, and subsequently, was clerk to the Cowpen District Local Board, and at the same time was a shareholder in the Blyth and Cowpen Gas Company. During the year 1882 the Blyth and Cowpen Gas Company supplied gas for the purposes of the Cowpen District Local Board, and received payment from the board for the supply at 46*s.* per lamp for the season. There was no contract under seal, or any regular contract, but the secretary of the gas company wrote a letter to the board, and the terms were accepted by a resolution on the 6th of July, 1882, which resolution was entered on the minutes of the board.

Section 193 of the Public Health Act, 1875 (38 & 39 Vict. c. 55) provides that "Officers or servants appointed or employed under this Act by the local authority shall not in anywise be concerned or interested in any bargain or contract made with such authority for any of the purposes of this Act. If any such officer or servant is so concerned or interested, or under colour of his office or employment exacts or accepts any fee or reward whatsoever other than his proper salary, wages, and allowances, he shall be incapable of afterwards holding or continuing in any office or employment under this Act, and shall forfeit and pay the sum of fifty pounds, which may be recovered by any person, with full costs of suit, by action of debt."

T. W. Chitty, for the appellant.—There was no "bargain or contract" under seal, as required by section 174. The defendant was not "concerned or interested" in the contract; his interest was only in the company. He was not a party to the contract. All his interest (if any) was in his dividends, which is so small an interest that the Legislature cannot have intended to forbid it. The action was not brought within one year from the date of the contract alleged, and so is too late—31 Eliz. c. 5.

Bosanquet, Q.C., and *J. L. Walton*, for the respondent.—The possible smallness of the shareholder's interest does not affect the question. The shareholder might hold half the shares. It is enough if he is interested. The Legislature meant the words to apply to shareholders. In regard to members of the board, it is provided by rule 64 of the schedule to the Act that any member who, among other things, "is concerned in any bargain or contract entered into by such board, or participates in the profit thereof, shall cease to be such member: provided that no member shall vacate his office by reason of his being interested in any contract with the local board as a shareholder in any joint-stock company."

By section 28 of 5 & 6 Will. 4. c. 76, no person can be a councillor or alderman "during such time as he shall have directly or indirectly by himself or his partner any share or interest in any contract or employment with, by, or on behalf of such council: provided that no person shall be disqualified by reason of his being a proprietor or shareholder of any company which shall contract with the council of such borough for lighting or supplying with water or insuring against fire any part of such borough."

By 32 & 33 Vict. c. 55. s. 5, it is provided that "from and after the passing of this

Coram Brett, M.R., Cotton, L.J., and Lindley, L.J.

Act no person shall be deemed to have had or to have an interest in a contract or employment with, by, or on behalf of the council of any borough by reason only of his having had or having a share or interest in any railway company or any company incorporated by Act of Parliament or by royal charter or under the Companies Act, 1862."

When the Legislature meant to except the interest enjoyed by a shareholder, it has done so in express terms; but it has not done so in this case. As to a person being a shareholder having an "interest" they cited *Dimes* v. *The Grand Junction Canal Company* (1), in which it was held by the House of Lords that a judgment of Lord Cottenham as Lord Chancellor on appeal from a Vice-Chancellor was voidable, and ought to be reversed.

As to the period of limitation, the offence was continuing; and as to the contract not being under seal, there was a contract under 50*l.* from day to day.

Chitty, in reply.—Section 28 of 5 & 6 Will. 4. c. 76 has the words "directly or indirectly," not contained in this section; and in any case, whatever construction the Legislature put in the Amendment Act on the words of the previous Act, it is for the Court to say what the true legal construction is.

BRETT, M.R.—I am sorry that I am obliged to affirm this decision. The question is whether the defendant as a shareholder in the company supplying the district with gas can be said to be interested in the contract. If the matter were without authority I should doubt whether a shareholder can properly be said to be interested in the contracts of his company. But the question is whether this Act meant to strike at such an interest. We have been referred to another Act drawn substantially in the same words. The omission of the words "directly or indirectly" does not make a substantial difference. Subsequently to that Act another Act was passed excluding in express terms the case of interest as a shareholder. That Act was not a declaratory Act, but an amending Act, and applies only "from and after" its passing. By enacting that the previous Act was not to apply to shareholders for the future, it assumes that without an express exemption a shareholder would be interested. Whether the case in the House of Lords goes the whole length of the plaintiff's contention I am not prepared to say, but it decides that holding shares is an interest. I am not satisfied that the defendant was "concerned in" this contract. Was he interested within the year during which the statute runs? The penalty is not in respect of making the contract, but being interested in the contract; and it is impossible to suppose that there was any contest at the trial as to the existence of the contract down to the time of the trial. The appeal must be dismissed, with costs.

COTTON, L.J.—I am of the same opinion. There is no suggestion of corruption against the defendant, but a simple rule is laid down by the statute which he has transgressed. I think he was interested in the contract. The schedule to the Act helps to shew that he was, as participation in profits is there made a form of interest. The profit from the contract goes into the pocket of the company, and thence into the defendant's pocket. I do not think the words "directly or indirectly" in the Corporations Act make it substantially differ from this Act. I reserve my opinion whether the defendant was concerned in the contract, especially as it might involve us in the question of limitation.

LINDLEY, L.J.—I am of the same opinion. I think that rule 64 of the schedule throws light on the meaning of this section; but I am glad that the operation of it has been modified by the Legislature.

Appeal dismissed.

Solicitors—Brownlow & Howe, agents for Edward Clark, Newcastle-upon-Tyne, for plaintiff; J. E. & H. Scott, agents for W. S. Daglish, Newcastle-upon-Tyne, for defendant.

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(1) 3 H.L. Cas. 759.

[IN THE COURT OF APPEAL.]

1884. Oct. 25, 27. THE MERSEY DOCKS AND HARBOUR BOARD *v.* THE OVERSEERS OF THE PARISH OF LLANELIAN.*

Poor—Rate—Rateability of Lighthouse—Telegraph Station—Receipts limited by Statute to amount of Conservancy Expenditure—Rateability of Adjoining Houses—Principle on which their Value should be estimated.

The Mersey Docks and Harbour Board have by statute the right to levy certain harbour and light dues; but these dues are so fixed that with the other receipts applicable to conservancy purposes the receipts must not exceed the expenditure on those purposes, so that no profit can accrue to the board in respect of lighthouses. The board own as part of their conservancy apparatus a tower which is used as a lighthouse and a telegraph station, and they also own certain houses near to this tower which are inhabited by light-keepers and workmen as servants of the board:— Held, *that the board were not liable to be rated in respect of the tower, inasmuch as the use of it was so limited by statute that no profit could arise therefrom, and therefore that there could be no beneficial occupation of it by any tenant; but that they were liable to be rated in respect of the adjoining houses, and that in estimating the value of these houses the fact of their proximity to the lighthouse tower ought to be taken into account.*

Cross-appeals from the judgment of the Queen's Bench Division upon a Special Case the material parts of which were as follows:—

In August, 1879, the overseers of the parish of Llanelian made a supplemental valuation list of rateable hereditaments in the parish of Llanelian in the county of Anglesey, and therein assessed the Mersey Docks and Harbour Board in respect of a lighthouse, telegraph station, houses, buildings, and land at Point Lynas at the gross estimated value of 305*l.* and a rateable value of 244*l.* The assessment committee of the Anglesey Union confirmed the assessment.

The overseers of the parish then made a poor rate in accordance with this list. The rate was appealed against; whereupon the Special Case was stated. Prior to the year 1857, the docks at Liverpool were vested in the corporation, who were empowered to levy harbour, light, and other dues upon vessels entering the port of Liverpool. In 1857 an Act was passed incorporating certain persons as the Mersey Docks and Harbour Board, and to them were transferred all the rights of the corporation over the docks at Liverpool. Various other Acts have been passed containing regulations for and giving powers to the Mersey Docks and Harbour Board.

Section 54 of the Mersey Docks and Harbour Act, 1857, provides that "The following account shall be kept separately, and shall be dealt with as distinct sources of income and expenditure (that is to say):—

"(1) An account of all sums received and disbursed by the board in respect of the following matters, and hereinafter called 'conservancy receipts' and 'conservancy expenditure': that is to say, in respect of the maintenance of buoys, landmarks, and telegraphs, the expense of lights and lifeboats, the expense of the marine surveyor, the expenses to be incurred as hereinafter mentioned, with the consent of the Commissioners for the Conservancy of the River Mersey, in improving of the port of Liverpool or the navigation of the river Mersey, the expenses to be incurred in the exercise of the jurisdiction hitherto vested in the corporation of appointing a water bailiff and removing sunken vessels and other impediments to the navigation.

"(2) An account of all sums received and disbursed by the board in the exercise of the powers hitherto vested in the Liverpool Pilotage Commissioners, hereinafter called 'pilotage receipts' and 'pilotage expenditure.'

"(3) An account of all other sums received and disbursed by the board in pursuance of this Act, and hereinafter called 'general receipts' and 'general expenditure.'"

Section 55: "The board may, with the consent of the Conservancy Commis-

* *Coram* Brett, M.R., Cotton, L.J., and Lindley, L.J.

sioners, apply any portion of their general receipts, after providing for the expenses and charges incidental to the Mersey Dock estate, in improving the port of Liverpool or the navigation of the river Mersey; they may also increase or diminish and again increase any rates or dues leviable by them in pursuance of this Act either generally or in respect of any particular articles."

Section 56: "The following rules shall be observed by the board with respect to the moneys received by them under this Act (that is to say):—

"(1) The conservancy expenditure shall be defrayed out of the conservancy receipts.

"(2) The pilotage expenditure shall be defrayed out of the pilotage receipts.

"(3) No portion of the conservancy receipts or pilotage receipts shall be applied in aid of the general expenditure.

"(4) No sums shall be payable in respect of docks by any vessel that does not use the same.

"(5) Save as by this Act provided, no moneys receivable by the board shall be applied to any purpose unless the same conduces to the safety or convenience of ships frequenting the port of Liverpool, or facilitates the shipping or unshipping of goods, or is concerned in discharging a debt contracted for the above purposes."

The Mersey Docks Consolidation Act, 1858, empowered the board to purchase land for the erection of lighthouses, and to establish lightships, and under the provisions of these Acts and the Merchant Shipping Act, 1854, section 394, the board cannot discontinue any of their lighthouses without the sanction of the Trinity House. A system of telegraphs established for the benefit of shipping navigating the port of Liverpool was also vested in the board. By an agreement made in 1870 between the Postmaster-General and the board the Postmaster-General acquired certain lines of telegraph belonging to the board; but the station and premises at Point Lynas were not transferred to the Postmaster-General, but continue to be the property of the board, and the keepers of the station remain under their control.

The Mersey Docks Act, 1874, fixed certain harbour rates to be charged by the board, and enacted that the rates so charged should not with the other receipts of the board applicable to the conservancy account be higher than should be necessary for the purposes of conservancy expenditure. It also enabled the board to charge certain rates on all vessels entering the docks, which rates included dock dues and lighthouse dues. These dues were at one time kept separate from dock dues, but the Mersey Docks Act, 1874, provided that thenceforth "All sums received by the board in respect of harbour rates and the conservancy portion of the dock tonnage rates whether under the Act of 1858 or under this Act, and all sums disbursed by the board in respect of conservancy expenditure as defined by section 54, sub-section 1, of the Act of 1857, shall be deemed to be conservancy receipts or conservancy expenditure, as the case may be," and they were to be included in the separate account of such expenditure which by that section the board are required to keep, "and such account shall be called the conservancy account." In 1881 there remained in hand a surplus of conservancy receipts over conservancy expenditure, but the account is occasionally in arrear owing to larger expenses than usual being incurred. The surplus or deficit on the account in any year is carried forward to the same account in the year following.

The lighthouse at Point Lynas in the Isle of Anglesey in respect of which the board have been rated is one of the lighthouses vested in the board. None of the private Acts relating to the board contain any express provision exempting the lighthouse or other assessed premises from the payment of poor rates.

The board have purchased about sixteen acres, including the site of the lighthouse, and have built two houses for the lightkeepers, and a stable; the houses, stable, and land might, if not used in connection with the lighthouse, be let to other tenants at a rent. The lighthouse consists of a tower and a dwelling-house, and in the lighthouse there is a room used for working a telegraph-wire, which is maintained by the Postmaster-General for the exclusive use of the board. The dwelling-house and the other premises are occupied by the light-keepers as servants of the board.

The working and maintenance of the

light and telegraph at Point Lynas form part of the conservancy duties of the board, and the expenses are defrayed out of conservancy receipts. Apart from those receipts nothing is paid by any person to the board in respect of the lighthouse and telegraph station, or in respect of any of the assessed premises.

The tower of the lighthouse has no occupation value except as a lighthouse and as a telegraph station; and the board, in the existing state of circumstances, are the only persons to whom it is of value for those purposes. The board contend that it is not rateable, on the grounds that it is exempted by the 430th section of the Merchant Shipping Act, 1854, and that it is not, and cannot be, the subject of any beneficial occupation; and they contend that the premises other than the said tower ought to be assessed upon their value to be let from year to year, supposing they were not used for the light or telegraph but were disconnected therefrom and applied to any other purposes for which they might be available.

The overseers contend that the whole of the premises ought to be assessed upon their existing value to their existing occupiers. If the Court should be of opinion that the board are rateable in respect of the tower and the other premises as used at present for and in connection with the light and telegraph, the present assessment of the premises is to stand. If in respect of the tower as a telegraph station only and not as a lighthouse, and the other premises at their value as now used and occupied, the gross estimated rental is to be reduced to 120*l.* and the rateable value to 96*l.* If in respect only of the premises other than the tower at their value as now used and occupied, the estimated rental is to be reduced to 95*l.* and the rateable value to 76*l.* But if the board are rateable in respect only of the premises other than the tower upon their value supposing they were not used for the light or telegraph but were disconnected therefrom, then the gross estimated rental is to be reduced to 45*l.* and the rateable value to 40*l.*

The Queen's Bench Division held that the lighthouse was not rateable, but that the telegraph station was rateable, and that the adjoining houses ought to be rated at 76*l.*

Both parties appealed.

Bigham, Q.C., and *T. G. Carver*, for the Mersey Docks and Harbour Board.—The lighthouse and telegraph station are not rateable. The 430th section of the Merchant Shipping Act provides that "all lighthouses . . . . and all premises or property belonging to or occupied by any of the general lighthouse authorities shall be exempted from all parochial rates." If this section does not apply to lighthouses in connection with docks like these, the lighthouse in question is a mere adjunct of the docks, out of which by statute no profit can be made. But for the docks the lighthouse would be of no value. If the houses adjoining the lighthouse are to be rated, then the question arises as to the basis on which their value is to be estimated. They ought not to be assessed at a sum based on their connection with the whole system of the board, but only at the value which a tenant unconnected with the board and not desiring to use them for the purposes of the board would give. The fact that there is a lighthouse near to them ought not to be taken into account. *The Mersey Docks* v. *Cameron* (1), *The Metropolitan Board of Works* v. *West Ham* (2), *New Shoreham* v. *The Overseers of Lancing* (3), and *The Overseers of Chorlton-upon-Medlock* v. *The Guardians of Chorlton Union* (4) were cited.

McIntyre, Q.C., for the overseers.—The overseers of the parish contend that the lighthouse-tower is rateable, as it is capable of beneficial occupation.

[COTTON, L.J.—Can any one save the board levy the dues; and if that be possible, still can any profit accrue?]

The lighthouse is rateable, though the tolls and dues may not be rateable—*The Queen* v. *Tynemouth* (5) and *The King* v. *Coke* (6); and the telegraph station and

(1) 11 H.L. Cas. 443; 35 Law J. Rep. M.C. 1.
(2) 40 Law J. Rep. M.C. 30; Law Rep. 6 Q.B. 193.
(3) 39 Law J. Rep. M.C. 121; Law Rep. 5 Q.B. 489.
(4) 51 Law J. Rep. Q.B. 458.
(5) 12 East, 46.
(6) 5 B. & C. 797.

wire are maintained solely for the use of the board.

[BRETT, M.R.—It is not necessary to argue the point that the existence of the tower is a fact to be taken into account in estimating the value of the adjoining houses. The overseers claim to assess the tower as a lighthouse and a telegraph-station?]

That is their contention.

BRETT, M.R.—When the real facts are ascertained from this Special Case, it seems to me that there are in truth two kinds of buildings on this Point Lynas. One building is the tower, in which the light-house and the telegraph are; the other buildings are the houses or cottages which stand near this tower. The tower is occupied and is used, as I have said, for a lighthouse and a telegraph station, and I should say that it could not be used for anything else. The houses belong, as does the tower, to the Mersey Docks and Harbour Board, and they are occupied by workpeople in the employment of the board, for they stand close to the light-house tower. There are Acts of Parliament which deal with the use of the tower, considered both as a lighthouse and as a telegraph station; and it seems to me that the Acts of Parliament treat both of these as part of what may be called conservancy apparatus—that is, they form part of the provision which is required for the preservation and safety of the shipping. Now, this conservancy apparatus causes expense to the board, and gives the board a right to levy dues and to obtain receipts. The Acts of Parliament provide with regard to both kinds of receipts that they must not exceed the expenditure: so that with regard to this tower any hypothetical tenant must take and occupy it subject to the provisions of and the burdens imposed by these Acts, so that he would be unable to levy charges which would be more than enough to cover the expenditure, and his occupation of the tower would therefore be a profitless occupation, inasmuch as by the Acts of Parliament he can receive no profit from any earnings which he may make, and his occupation of the tower can therefore have no beneficial value to him. This tower, therefore, can only be used as a lighthouse and telegraph station, and while it is so used the burdens imposed are by statute equal to the benefits received, so that there can be no beneficial occupation of it, and it must be considered as struck with sterility by statute. Turning now to the consideration of the houses, it appears to me that there is nothing to prevent a beneficial occupation of these houses. The Acts of Parliament contain nothing which prevents the board from letting them to a tenant, and nothing which prevents them from being capable of beneficial occupation. This being so, what then is the measure of the rateable value of these houses? It is clear that for this purpose they must not be considered in connection with the whole value of the property belonging to the board in Liverpool; they must be considered as buildings at Point Lynas: the neighbourhood must be taken into account: and when that is done it is found that it consists of other buildings which may affect the letting value of these houses. The character of these neighbouring buildings must be taken into account, just as if when a number of workmen's cottages placed in the immediate neighbourhood of a large factory have to be valued for assessment it would be right to take into account the existence of the factory, the neighbourhood of which would most certainly affect their letting value. So in the present case it is right to take into account the fact that the board possesses a lighthouse and a telegraph station, that workmen must live in the neighbourhood, and that it is probable that they will live in these houses which are conveniently placed; and then after taking this into account the question is, what would a reasonable tenant pay for these houses? Such a tenant would of course consider what the board would give him for the use of these houses, and what rent he could thus insure: so that the existence of this tower, used as it is used, is a matter which a tenant would take into account, so that in consequence of the existence of it he would pay a larger rent than he would otherwise give. The existence of the tower must therefore be taken into account in deciding the value of these

houses to the extent which I have explained, and to that extent only. I think that the third question stated in this Special Case involves this principle, so that by the agreement of the parties the rateable value of these houses is 76*l.* We lay down the principle, but we do not decide whether that is the right sum. The fourth question seems to ask whether in considering the value of these houses it is legitimate to strike out altogether from consideration the existence of the lighthouse tower; and if that be the question, we must answer it in the negative. In the result, therefore, we decide that the tower is not rateable, but that the houses are rateable; and as there are cross-appeals, and both parties have claimed something which they are not entitled to to the extent to which they claim it, there will be no costs of the appeal.

COTTON, L.J.—The questions raised by this case seem to me to fall into two divisions. I think that the lighthouse and telegraph station are on the same footing and are both included in conservancy expenses: so that there can, as the Case states, be in respect of such expenditure no profit, nor can they produce any value. The conservancy expenditure is regulated by Act of Parliament, which provides in effect that there can be no profit made out of that department, for the receipts are so restricted that no beneficial result can arise from them to the board. If any one were to take the lighthouse tower as a tenant, he must take it fettered by the provisions of the Act; and if the receipts therefrom exceed the expenses, then by statute the surplus must be paid over to other conservancy objects: so that if the dues levied provided a surplus, still the tenant could not keep it. The occupation of this lighthouse tower could not be profitable or beneficial: so that it is not rateable, and questions 1 and 2 must be answered in favour of the board.

Questions 3 and 4 relate to the houses which are situated near to the tower. I do not think it is easy to appreciate the difference between the two questions; but I think the fourth question must mean that the tower is to be considered as non-existent, and that no account whatever is to be taken of it. If this be so, then I think that the third question contains the true principle, and that the value of the houses must be considered, regard being had to the neighbourhood of the light-house tower, and to the fact that the men employed in the lighthouse and on the telegraph would naturally live near to the tower; this therefore increases to some extent the value of these houses, and renders it probable that they are capable of beneficial occupation: so that the fact of the existence of the tower cannot be disregarded when the rateability of these houses is under consideration, although the Mersey Docks and Harbour Board are not liable to be rated for the tower itself.

LINDLEY, L.J.—I am of the same opinion, and for the same reasons.

Judgment accordingly.

Solicitors—F. Venn & Co., agents for A. T. Squarey, Liverpool, for the Mersey Docks and Harbour Board; Ravenscroft, Hills & Co., agents for W. Fanning, Amlwch, for the Overseers of Llanelian.

[IN THE COURT OF APPEAL.]

BANKRUPTCY. 1884. Dec. 12. } *In re* HUTTON; *ex parte* BENWELL.*

Bankruptcy — "Income" — Appropriation to Trustee—Prospective Earnings of Bankrupt — Personal Skill — Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 90.

Prospective income, to be earned solely by the personal skill of the bankrupt, of a precarious character and indefinite amount, is not "salary or income other than" that of an officer in the army, a civil servant, or Treasury pensioner, which may be ordered to be paid to the trustee under section 90 *of the Bankruptcy Act*, 1869.

Appeal of the trustee from an order of Mr. Registrar Pepys refusing to appropriate a portion of the income of the bankrupt

* *Coram* Brett, M.R., Cotton, L.J., and Lindley, L.J.

under section 90 of the Bankruptcy Act, 1869.

It was alleged that the bankrupt was earning an income of some 1,500*l.* a year in his practice as a "bone-setter," which was carried on by his personal skill with the use of certain appliances. He was paid by fees for his advice, attendances, and operations, and the fees included the supply of the necessary appliances. The application was that such portion of this income as the Court should think fit should be paid to the trustee.

Section 89 of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), provides that where a bankrupt is or has been an officer in the army, or a clerk in the civil service, or if a Treasury pensioner, the trustee shall receive so much of his pay, salary, or pension as the Court thinks just and reasonable.

Section 90 provides that "where a bankrupt is in receipt of a salary or income other than as aforesaid the Court, upon the application of the trustee, shall from time to time make such order as it thinks just for the payment of such salary or income or any part thereof to the trustee." Similar provisions are contained in section 53 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52).

Cooper Willis, Q.C., and *J. E. Palmer*, for the trustee, cited *Ex parte Huggins; in re Huggins* (1), *Emden* v. *Carte* (2), *Elliott* v. *Clayton* (3), *Crofton* v. *Poole* (4), and *In re Dowling; ex parte Banks* (5).

T. L. Wilkinson, for the bankrupt, was not called on.

BRETT, M.R.—The bankrupt in this case carries on business not as a surgeon, but as a "bone-setter," which he practises by the exercise of great and well known skill. His emoluments are the result solely of his personal exertions, and not from selling anything or supplying anything. It is not like the case of a person who earns money partly by his own skill and partly by the labour of others, as, for example, a cabinet-maker. The order does not ask to deal with anything already earned or already in his possession. It asks for income in the future which he may earn on an average of 1,500*l.* a year. What may be earned in the future does not pass to the trustee under the previous sections of the Act. There is no consideration to be fulfilled or contract made. It might as well be said that a promise to leave money by will is property which should go to the trustee, as that prospective earnings like these should be appropriated. The section in question has relation to the previous section, which applies to the case of a man who has been or is an officer in the army and so on. In those cases the man is entitled by the munificence of the Crown or by Act of Parliament to sums of money. He is entitled to them, but has not got them in possession. An additional power is given by this section in respect of things which must come to the bankrupt. The salary referred to is salary of the same kind as those others. Then the section says "or income." What is that? It is a general word at the end of particular words. The income intended is in the nature of a salary. We are asked to deal with income which the bankrupt may earn from year to year, because the income is of the same kind as a salary. I think it is not an income of the same kind as a salary, and that it is not within section 90.

COTTON, L.J.—We are asked to make a prospective order that something which is not yet earned, and which it is not certain that the bankrupt will earn, shall be appropriated to the trustee. A capacity of earning is in fact sought to be annexed. It is asked to make the bankrupt a slave for the trustee. I think we cannot make an order in reference to future income like this. Income of a similar kind with that in the preceding section is intended. The order must not deal with contingent or possible income. You cannot force the bankrupt to go on earning this income. The section applies to something definite, or something which can be rendered definite. This is on the evidence income

(1) 51 Law J. Rep. Chanc. 935; Law Rep. 21 Ch. D. 85.
(2) 51 Law J. Rep. Chanc. 371; Law Rep. 17 Ch. D. 768.
(3) 16 Q.B. Rep. 581; 20 Law J. Rep. Q.B. 217.
(4) 1 B. & Ad. 568; 9 Law J. Rep. K.B. 59.
(5) 46 Law J. Rep. Bankr. 74; Law Rep. 3h. D. 689.

derived solely from skill in operations. The things sold are simply assistants to that skill.

LINDLEY, L.J.—I am of the same opinion. The income in question is precarious. It is not received as a pension or as salary is received. We are asked to impound a portion of future earnings. The bankrupt can defeat our order by refusing to see patients. Whether it would be to his interest or not to do so I cannot say, but he might act in that way. It is said that there are authorities the other way. In the case of *Ex parte Huggins* (1) a Government pension was in question, and the application was not under section 89, but section 90. That is an illustration of the kind of case which was intended to be met by the section. *Emden* v. *Carte* (2) does not touch the point.

Appeal dismissed.

Solicitors — Thomas Durant, jun., for trustee Benwell; W. Maynard, for bankrupt Hutton.

[IN THE HOUSE OF LORDS.]

1884. June 20, 23, 24. July 28. Aug. 4. } BOWEN AND ANOTHER *v.* LEWIS.

Will—Devise—Estate Tail—Rule in Shelley's Case (1 Rep. 93 *b*).

A testatrix who died in 1820 *made the following devise:—"I give and devise unto my eldest son T. all my real and freehold estate, and all leases and leasehold premises now in my possession (subject to the payment of the rents and the performance of the covenants mentioned in the said indentures of leases), during the term of his natural life, and after his decease to his legitimate child or children (if any); but if he dies without issue my will is it may go unto my other son W. during the term of his natural life, and afterwards to his legitimate child or children (if any); but if he should likewise die without issue my will is that it may go to my daughter M. and to her heirs and assigns for ever."*

The devise was subject to the payment of certain legacies, and there was a provision that if T. died in less than fourteen years after coming into possession of the estate and leaving no issue, the person succeeding him should repay to his "heirs, executors, or assigns" whatever he should have paid in respect of the legacies above ten pounds for every year he should have been in possession. A like provision followed for the case of T.'s "successor" dying without issue before the expiration of the remainder of the fourteen years.

T. executed and enrolled a disentailing deed in 1854, *and died, without ever having had issue, in* 1862:—

Held (*by* EARL CAIRNS, LORD BLACKBURN, *and* LORD FITZGERALD; *dissentientibus* EARL OF SELBORNE, L.C., *and* LORD BRAMWELL), *that T. took an estate tail; such estate tail being (according to* LORD BLACKBURN *and* LORD FITZGERALD) *subject to joint estates for life taken by his children, if any.*

Per EARL OF SELBORNE, L.C., *and* LORD BRAMWELL.—*T. took an estate for life with remainder to his children as purchasers in fee-simple, and remainders over in the event (which happened) of no such children coming into existence.*

This was an appeal from a decision of the Court of Appeal, which affirmed one of Manisty, J.

The action was one of ejectment brought by the respondent to recover a farm at Carvarchell, Pembrokeshire, and mesne profits. It was tried at the summer assizes, 1882, at Haverfordwest, before Manisty, J., without a jury, upon the following state of facts:—

Mary Thomas, being seised in fee-simple of the farm, made her will on the 2nd of March, 1820, which so far as is material was as follows:—

"I give and devise unto my eldest son Thomas Thomas all my real and freehold estate, and all leases and leasehold premises now in my possession (subject to the payment of the rents and the performance of the covenants mentioned in the said indentures of leases), during the term of his natural life, and after his decease to his legitimate child or children (if there be any); but if he dies without issue, my

will is it may go unto my other son William Thomas, during the term of his natural life, and afterwards to his legitimate child or children (if any); but if he should likewise die without issue my will is it may go to my daughter Mary Bevan, and to her heirs and assigns for ever. But this bequest and devise is, nevertheless, subject to the following payments and restrictions, that is to say:—If my son Thomas shall live in the possession and enjoyment of the said real estate for fourteen years, the whole of the sums hereinafter by me bequeathed shall be paid by him alone, and his heirs or assigns shall have no claim upon his successor for repayment of any part of the same; but should he die in less than fourteen years after coming into possession of the said estate and leaving no issue, my will is that he shall pay only a part of the said sum, that is, according to ten pounds for every year he shall be in possession, and the person succeeding him in the possession of the said estate shall before he shall have possession repay unto the heirs, executors, or assigns of my said son Thomas Thomas whatever shall have been paid by him of the said sums hereinafter to be bequeathed above ten pounds for every year he shall have been in possession, and should his successor die without legitimate issue before the expiration of the remainder of the fourteen years, his heirs, executors, or assigns shall have the like claim of his successor as in the former case. I give and bequeath unto my daughter Elizabeth Layn the sum of two shillings and sixpence. I give and bequeath unto my said son William the sum of twenty pounds. I give and bequeath unto each of my daughters following, namely, Mary, Phœbe, Amy, Anne, and Margaret, the like sum of twenty pounds each, the whole of the said legacies to be paid by my executor, hereinafter named, within twelve calendar months after my decease. I also give and bequeath unto each of my daughters as shall continue unmarried at the time of my death the whole of the stock and crop, implements of husbandry and household furniture, to be divided amongst them, share and share alike. And, moreover, my will is that my last-mentioned daughters shall be maintained and provided for in meat, lodgings, and washing for five years after my decease, if they remain so long unmarried (if one or any of them should marry before the expiration of the said five years she or they shall be provided for until their marriage only), by the person in whose possession the real estate before mentioned and devised shall be, or, if they or either of them shall prefer it, to be paid three pounds each (and support themselves elsewhere), that is, three pounds each annually for the term and according to the rule above mentioned by the said mentioned person. The residue and remainder of my property, of what nature and kind soever the same may be (after paying my just debts, funeral expenses, and the expenses of proving this will), I give and bequeath unto my said son Thomas Thomas, and I nominate, constitute, and appoint him the sole executor of this my last will and testament, hereby revoking all other will or wills by me before made. In witness," &c.

The testatrix died on the 29th of June, 1820, leaving two sons surviving—namely, Thomas Clement Thomas the elder and William Thomas the younger.

T. C. Thomas thereupon entered into possession of the farm, and subsequently executed and enrolled a disentailing deed, dated the 3rd of January, 1854, through which the respondent's title was derived.

T. C. Thomas died in 1862 without issue, and the appellant Bowen, who was his lessee, paid rent to his widow until her death in 1878. William died in 1874, leaving issue the appellant J. K. Thomas, and a daughter. On the death of T. C. Thomas's widow in 1878 J. K. Thomas took possession, and in 1879 demised the farm to Bowen.

Manisty, J., held that T. C. Thomas took an estate tail under the will, and gave judgment for the respondent. His decision was affirmed by the Court of Appeal on the 24th of April, 1883.

The present appeal was first argued before the Earl of Selborne, L.C., Lord Blackburn, and Lord FitzGerald.

Crossley, Q.C. (*B. F. Williams* with him), for the appellant.—Where there is a devise over on failure of issue following upon a gift to children in fee-simple, the failure

of issue must mean failure of children who would take under the prior gift. The words will be considered merely as referential—*Goodright* v. *Dunham* (1), *Ginger* v. *White* (2), and *Malcolm* v. *Taylor* (3).

The intention of the testatrix, to be gathered from the whole will, was to give the fee-simple to the children; particular expressions which, strictly construed, would be inconsistent with this intention must be moulded—*Key* v. *Key* (4), *per* Knight-Bruce, L.J., *Towns* v. *Wentworth* (5), *per* Pemberton Leigh (afterwards Lord Kingsdown), and *Sweeting* v. *Prideaux* (6), *per* Hall, V.C.

The disentailing assurance is consequently void.

Bowen Rowlands, Q.C., and *Abel Thomas*, for the respondent.—The children do not take the fee-simple, but at most a life estate only—*Morgan* v. *Thomas* (7). Their father took an estate tail—*Robinson* v. *Robinson* (8), *Roddy* v. *FitzGerald* (9), and *Doe* v. *Harvey* (10).

The intention of the testatrix was to keep the estate in the family, as appears from the limitations and the ultimate gift over. "Children" must be construed "issue." See notes to *Shelley's Case* (11) in *Tudor's L.C. in Real Property*. There were words of limitation superadded in *Ginger* v. *White* (2) and *Goodright* v. *Dunham* (1), which are consequently distinguishable—see *Montgomery* v. *Montgomery* (12), where the cases are reviewed. *Jesson* v. *Wright* (13), *Lewis* v. *Waters* (14), *The King* v. *The Marquess of Stafford* (15), *Doe* v. *Lean* (16), *Bradley* v. *Cartwright* (17), *Clifford* v. *Koe* (18), *Wild's Case* (19), *Wilkinson* v. *Chapman* (20), 2 *Jarman on Wills*, 4th ed. 452, 459, *Tudor's L.C. in Real Property*, 3rd ed. 753, and cases there cited, were also referred to.

Crossley, Q.C., in reply, cited *Baker* v. *Tucker* (21) and 2 *Jarman on Wills*, 4th ed. p. 482.

Cur. adv. vult.

The case was reargued on the 28th of July by *Crossley, Q.C.*, for the appellant, and *Bowen Rowlands, Q.C.*, for the respondent.

Cur. adv. vult.

THE LORD CHANCELLOR (EARL OF SELBORNE) (Aug. 4).—This case has been twice argued, and there remains, after the second argument, a difference of opinion among your Lordships. I have the misfortune to have formed an opinion in which the majority of your Lordships do not concur, but nevertheless it is my duty to state it.

The Court of Appeal, when deciding for an estate tail in this case, appears to have been much influenced by the consideration that the testatrix Mary Thomas was a person unacquainted with the technical signification of legal terms, and to have thought it safe to rely upon a general purpose, supposed to be discoverable from the will, without endeavouring to apply the ordinary rules of construction to its particular words and dispositions. With unfeigned respect for the very learned Judges who so decided the case, I feel myself obliged to follow an opposite process—first, because I should not be led to the same conclusion with the Court of Appeal, if, without regard to the technical rule established in *Shelley's Case* (11), I considered only what the testatrix, as an unlearned person, was likely to have meant by the words which she used; and, secondly, because I cannot myself discover, from the language of this will, any general intention to keep her property in her family,

(1) 1 Dougl. 264.
(2) Willes, 348.
(3) 2 Russ. & M. 416.
(4) 4 De Gex, M. & G. 73; 22 Law J. Rep. Chanc. 641.
(5) 11 Moore P.C. 526.
(6) 45 Law J. Rep. Chanc. 378; Law Rep. 2 Ch. D. 416.
(7) 51 Law J. Rep. Q.B. 289; ibid. Q.B. 556; Law Rep. 8 Q.B. D. 575; ibid. 9 Q.B. D. 643.
(8) 1 Burr. 38.
(9) 6 H.L. Cas. 823.
(10) 4 B. & C. 610; 4 Law J. Rep. Q.B. 18.
(11) 1 Rep. 93*b*.
(12) 3 Jo. & Lat. 47.
(13) 2 Bligh, 1.
(14) 6 East, 336.
(15) 7 East, 521.
(16) 1 Q.B. Rep. 229; 10 Law J. Rep. Q.B. 60.
(17) 36 Law J. Rep. C.P. 218; Law Rep. 2 C.P. 511.
(18) Law Rep. 5 App. Cas. 447 (Irish).
(19) 6 Rep. 16*b*; Tudor L.C. in R.P. 3rd ed. 669.
(20) 3 Russ. 145.
(21) 3 H.L. Cas. 106.

in a way which could only be effectuated by vesting estates tail in her sons Thomas and William, apart from the operation of those purely technical rules of construction of which the testatrix, as an unlearned person, may be presumed to have been ignorant, though a Court of construction may nevertheless be bound to act upon them, so far as they apply.

Construed naturally, and apart from technical rules, I should certainly say that when the testatrix gave her real estate to her son Thomas (and afterwards, in a certain event, to her son William) "during the term of his natural life," she meant him to take it for life, and no longer; and that when she gave it, "after his decease, to his legitimate child or children, if any" (without restricting them to life estates), she meant those children (if there were any) to take all that she had to give, or, in other words, to take the fee. This will, having been made in 1820, is not subject to the Act of 1837. But with reference to the change made by section 28 of the Act of 1837, Mr. Jarman rightly observes that "perhaps there was no one of the old rules of testamentary construction which so directly clashed with popular views as that which required words of limitation, or some equivalent expression, to pass the inheritance; and hence the attention of the framer of the recent Act of 1 Vict. c. 26 was naturally directed to the abolition of this technical doctrine." Unless that technical doctrine applies here, so as necessarily or properly to govern the construction of this will, I cannot presume the intention of this testatrix to have been in accordance with it because she was unlearned; nor can I find in the sequel of the will any sufficient evidence of any general intention, to which the particular intention expressed in the dispositions in favour of Thomas and his children (whatever may be their proper construction) ought to give way.

If those dispositions had stood alone, without the contingent gifts over which follow them, it is, in my opinion, clear that they would have given the eldest son of the testatrix, Thomas, an estate for life only, with remainder in fee-simple to his children, if more than one, as joint tenants (or, if only one child, to that child), immediately on their, his, or her coming into existence—*Randall* v. *Tuchin* (22) and *Ibbetson* v. *Beckwith* (23). The words "all my real and freehold estate" in such a context would, beyond question, have supplied the want of an express limitation to the children's heirs. "Estate" here is a word free from ambiguity. It cannot (as in some cases) describe a particular subject as distinguished from the entirety of the right and interest of the testatrix in that subject. She had the fee-simple, and that is what she gives. And it is not immaterial to observe that the construction which makes a gift of "all my estate" to A B equivalent to a gift to A B and his heirs is not technical, but is one of good sense, displacing technicality. It is one which ought not itself to be displaced without some context repugnant to it. In the words of Chief Justice Gibbs, "It shall carry a fee unless restrained by other parts of the will. It may be that the signification of the word 'estate' may be restrained; but it lies on the party who seeks to narrow its construction to shew by what expressions in the will it is restrained."

It is, however, necessary to construe these dispositions, not as if they stood alone, but with due regard to all the rest of the will. The testatrix proceeds to say: "But if he" (that is, Thomas) "dies without issue, my will is it may go unto my other son, William Thomas, during the term of his natural life, and afterwards to his legitimate child or children, if any; but if he should likewise die without issue, my will is it may go to my daughter, Mary Bevan, and to her heirs and assigns for ever." Upon these words there arise three questions—first, what is meant by "his legitimate child or children, if any"? secondly, what is meant by "dying without issue"? and, thirdly, whether the express limitation to the "heirs and assigns" of the daughter, in the event in which she is to take, ought to have any, and what, influence upon the construction of the antecedent words?

1. The primary sense of the word "children" is issue of the first generation, and that primary sense ought to be

(22) 6 Taunt. 410.
(23) Ca. t. Talb. 157.

adhered to when there is nothing, or not enough, to displace it. There are, no doubt, cases in which it is equivalent to issue in the widest sense, as in *Wild's Case* (19), when a parent and his unborn children would otherwise take concurrently; or under such a form of gift as that in *Lord Tyrone* v. *Lord Waterford* (24), "to my brother J. B. and to his children in succession," where no definite estate was limited either to the parent or to any child, and where "succession" (the only thing expressed) might be best accomplished through an estate tail in the father, under which every child in turn might take the inheritance. But there is no resemblance between such cases and one in which an estate is expressly given to the father "during the term of his natural life," and, "after his decease, to his legitimate child or children, if there be any"; nor can I derive any assistance for the determination of the present question from such a case as *Robinson* v. *Robinson* (8), in which the singular word "son," in the particular context in which it stood, was held to be *nomen collectivum*.

Unless, in this case, the subsequent context is enough to prevent the application of ordinary principles of construction, the children must take as purchasers, in remainder after their father's life estate, whether they take for life only or in fee. I am myself unable to find anything in the subsequent context which ought to prevent them from so taking. On either supposition, the words which introduce the gift over—"but if he" (that is, the father) "dies without issue"—will receive full effect, without altering or enlarging the proper sense of the word "children." If they take for life only, an estate tail will be implied in the father, not immediate (so as to exclude them), but in remainder after their life estates, or in the contingency of there being no child. If they take the fee, then (I think) the referential construction of the word "issue" ought to prevail, and the gift over will take effect if there is no child. There is not in either view any occasion for imposing a sense on the words "child or children" which would make them words of limitation, and so defeat the manifest intention to give something directly to the children after their father's life estate. The rule in *Shelley's Case* (11) ought not, in my opinion, to be extended so as to defeat unnecessarily the expressed intention by straining the interpretation of such words as "child or children" when they are capable of being understood in their usual and primary sense.

If the children take as purchasers, I am unable to see why they should not take the fee, under any words sufficient in themselves to give it, merely because there is a gift over, if the father "dies without issue." There is no limitation here of fee upon fee; it is an alternative limitation, to take effect if the prior limitation to the children fails. That this would be so, if the limitation were to the children "and their heirs," is not disputed; and to me it seems that the effect would have been the same if the words had been, "And after his decease I give my said estate to his legitimate child or children, if any." No doubt the word "estate" does not occur in that exact place; but it does occur in a way which—as in *Ibbetson* v. *Beckwith* (23) and *Randall* v. *Tuchin* (22)—is really equivalent to it, unless there be something in the context repugnant to that construction.

I am not moved by the consideration that the testatrix may not have been likely to intend the fee to vest absolutely in children who might afterwards die without issue in the lifetime of their father. This supposed improbability would have had no weight as against the legal effect of a gift to the children and their heirs; and it ought not, I think, to alter the construction of other words, which otherwise would be equivalent to such a gift. For this purpose it cannot, in my opinion, make any difference whether there is a gift to "issue," with words of distribution (but without mention of heirs), therefore construed "children"—as in *Montgomery* v. *Montgomery* (12)—or a gift to children expressly, as here. In either case, if there was any child to take, the gifts over would fail to take effect, although such child might die in minority without issue. It is not safe to assume that testators, especially those who are unlearned, speculate upon

(24) 1 De Gex, F. & J. 613; 29 Law J. Rep. Chanc. 486.

or provide against possible consequences of their dispositions in all the contingencies which may happen to the objects of their bounty.

2. Thinking as I do that the context of this will, so far, is not repugnant to the vesting of a fee in the children (if any), and that the word "estate," as it here occurs, is sufficient for that purpose, the interpretation of the words "dying without issue" presents to my mind no difficulty.

A devise over in the event of the death "without issue" of a tenant for life, all whose children take in remainder after him in fee, does not generally (according to authorities well founded in principle, and which have been regarded for more than a century as law) either enlarge the *prima facie* sense of the word "children" so as to make it include issue beyond the first generation, or give an estate tail by implication to the tenant for life under the rule in *Shelley's Case* (11). "It is well settled," says Mr. Jarman (25), "that words importing a failure of issue (without the word 'such'), following a devise to children in fee-simple or fee-tail, refer to the objects of that prior devise, and not to issue at large," quoting *Ginger* v. *White* (2) (decided in 1742), *Goodright* v. *Dunham* (1) (1779), and *Malcolm* v. *Taylor* (3) (1831), to which may be added the observations of Lord Kingsdown in *Towns* v. *Wentworth* (5). This construction is in accordance with good sense, especially when the gift over is (as here) introduced by the word "but," and it is in no way opposed to the very different class of authorities (referred to and distinguished by Mr. Jarman at pages 444–445 of the same volume), in which, "similar words, preceded by a devise to one or more son or sons only, have been decided not to be simply referential, but to import a general failure of issue, and therefore, in the case of real estate, to confer an estate tail on the parent"; to which class the case of *Key* v. *Key* (4), relied upon by the respondent's counsel, belongs.

It cannot, I think, make any difference, for this purpose, whether the children take estates of inheritance by virtue of such words as "estate" or "property," or by an express limitation to heirs. In *Montgomery* v. *Montgomery* (12) the gift was, of "all that and those my part of the towns and lands of A, being lately part of the estate of J. K., purchased by me under a decree of the Court of Chancery," to the testator's son William Montgomery, "during his natural life and no longer, unless it shall so happen that my said son shall survive his present wife, and marry a second or other wife, by whom he shall have lawful issue living at the time of his death; and then and in that case" (so the will made in 1791 continued) "I leave, devise, and bequeath my said part of said towns and lands of A, upon the death of my said son, leaving issue male of such second or other marriage, to such issue male, share and share alike; and for want of issue male, to the issue female of such second or other marriage, share and share alike; and in case it shall so happen that my said son shall die without leaving any such issue of a second or other marriage, then and in that case I leave, devise, and bequeath said towns and lands of A to my two grandsons James and John Armstrong and their heirs, and the survivor of them, share and share alike, to hold to their own use and benefit for ever; and in case the said James and John Armstrong shall happen to die without leaving lawful issue, then I leave, devise, and bequeath the said last mentioned towns and lands to my grandson M. M. Armstrong and his heirs; and in case of his death without lawful issue, I leave, &c., the said last-mentioned towns, lands, and premises to my said two grandsons R. and W. Armstrong, and their heirs, share and share alike, for ever." In the gifts to the issue of William Montgomery there was no limitation to heirs; but Lord St. Leonards held the words descriptive of the subject of gift (*see* page 61) to be sufficient to designate all the estate which the testator had purchased at the auction referred to, and, therefore, to pass the fee to the children of William Montgomery; although in the contingent gifts over, which followed, there were express words of limitation to heirs. His Lordship thought it clear "that the testator intended his son to take for life only, and the sons or daughters of the son, by any subsequent

(25) 3rd ed. vol. ii. p. 434.

marriage, to take the fee as purchasers, as tenants in common; and the grandsons, the remaindermen, only to take upon the contingency of the first devise not taking effect." Upon the question whether the children of Thomas, the eldest son of the present testatrix, would take estates in fee, this case appears to me to be a direct authority (indeed I should say an authority *a fortiori*) for the present appellants; and although the word "such" occurred there in the gift over (in a manner in which it does not occur in the present case) I cannot doubt that, if it had been absent, the conclusion of Lord St. Leonards would have been the same. Lord Wensleydale in *Roddy* v. *FitzGerald* (9) quoted in terms of approval the proposition of Mr. Jarman (26), deduced from this and other cases, that "where words of distribution, together with words which would carry an estate in fee, are attached to the gift to the issue, the ancestor takes an estate for life only; and the result is the same, whether the fee is given by the technical words "heirs and assigns," or by such words as "estate," "part," "share," &c., occurring in the description of the subject of gift, or words imposing a pecuniary charge upon the issue, . . . and whether there is a gift over on general failure of the issue of the ancestor or not." The presence or absence of words of distribution is material when the question is whether "issue" (or the like) is itself a word of limitation, or is descriptive of persons who are to take as purchasers; but I do not think it material when the gift is to "children," and when there is no other reason for holding "children" to be a word of limitation. I cannot think that the mere absence of words of distribution is a sufficient ground for excluding the referential construction of the word "issue." The gift embraces all possible children, and there is no more reason why they should not take the fee in joint tenancy, by virtue of the word "estate," than why they should not have taken it as tenants in common, if the gift had contained words of distribution. There is no more ground for rejecting the referential construction of the word "issue" because of the possibility that a child might die leaving issue without having severed the joint tenancy, than t ere was in *Towns* v. *Wentworth* (5) by reason of the possibility that a child might die, leaving issue in the testator's lifetime (as to which see Lord Kingsdown's observations). Why should this testatrix be supposed to have been thinking of the legal incidents and consequences of a joint tenancy, but not of the legal incidents and consequences of an estate tail?

3. I am unable to find in the rest of the present will (unless it be in the provisions as to the repayment of legacies paid by the devisees of the real estate) anything which, either on principle or authority, ought to alter or affect the construction of the gifts to the children. The limitations to William for life, and afterwards to his legitimate child or children, if any, correspond exactly with those in favour of Thomas and his children, and they would take effect (according to the referential construction of "issue") if Thomas had no child to take, and in that event only. The gift over to the daughter is introduced by like words; and if the referential construction is right in the places where they previously occur, it is right there also. *Montgomery* v. *Montgomery* (12) appears to me (as I have already said) to be a direct authority against the suggestion, that because the ultimate contingent gift is to the daughter, "and to her heirs and assigns for ever," therefore the word "estate," in the description of the subject-matter of the gift, ought not to be held to pass the fee under the prior alternative gifts to the children of Thomas and William. *Ibbetson* v. *Beckwith* (23) is also an authority to the same effect. The proposition of Mr. Jarman (27) that "where the word 'estate' occurs elsewhere in the same will, in company with express words of limitation in fee, its operation to confer the inheritance is not thereby restrained," is supported by authority; and I cannot conceive why it should be so restrained when that word occurs once only at the commencement of a series of gifts, of which the latter are contingent upon events which may or may not happen, and are substituted, in those events only, for the

(26) 3rd ed. vol. ii. p. 417.

(27) Ibid. p. 257.

earlier; the last only of those contingent gifts being made with express words of limitation in fee. The case of *Doe* v. *Harvey* (10) was very different, and appears to me to have no bearing upon the present question.

I was struck, upon the second argument of this case, by the fact (not much insisted upon by the learned counsel on either side) that in the directions which she has given for the repayment, in certain events, of legacies made payable by the devisees of the real estate, the testatrix has provided for the death of her son Thomas within fourteen years after coming into possession, "and leaving no issue" (in which case "the person succeeding him in the possession of the said estate" was to make the repayment), and for the death of "his successor," "without legitimate issue," before the expiration of the remainder of the fourteen years (in which case his representatives were to "have the like claim upon his successor as in the former case"). These directions certainly shew that the testatrix did not intend the amount of the legacies to be repaid to a father whose issue might take the estate after him, and they appear to me to be more favourable than anything else in the will to that construction which would give the father an estate tail. But, after considering them, I am not satisfied that they are not consistent with the opposite case of the children taking the fee by purchase in remainder after their father's life estate. I think the persons here contemplated as entitled to receive repayment are only Thomas and William, both expressly made tenants for life by the will; and the reason for making such repayment of a capital charge to a tenant for life, who dies within a short time of coming into possession, is obvious, and would be less applicable to a tenant in tail. If there were issue to take after Thomas, or after William, whether by purchase or by inheritance, William (in the one case) and Mary (in the other) would not "succeed to the possession of the estate," and therefore could not be charged with the obligation of making repayment to the representatives of the preceding owner. These directions, therefore, are in their substance consistent and appropriate, if the children take the fee, and I do not think that the use in them either of the word "issue" or of the word "leaving" is sufficient to determine the construction of the antecedent words of gift.

I am of opinion that the decisions of the Courts below are erroneous, and ought to be reversed; but, as I believe that a majority of your Lordships think differently, the judgment of the House will be according to their view.

Earl Cairns.—It is not by any means surprising that the minds of those who have to consider this very difficult and obscure will should differ as to the proper construction of it. I observe that it was said in the Court below that the testatrix appears to have been an illiterate person in humble life. I do not think that that is what has created the difficulty. If the testatrix had used her own words, very possibly they might have been obscure, and such as an illliterate person would have used; but at the same time your Lordships would have had the satisfaction of knowing that in putting a construction upon them you were putting a construction upon the words actually used by the testatrix herself. Now what your Lordships have to deal with here are words which are clearly not the words of the testatrix herself — they are the words of some person who appears to have considered himself a lawyer; and no doubt he was acquainted with the legal terms used in making a will, but at the same time he was not sufficiently master of the law to be fully aware of the effect of the words that he was using. That appears to me to be what has created the difficulty. You have not got the words of the testatrix herself, and you have got words which there is great reason to suppose she did not understand, and which I cannot think that the person who used them understood himself in their full effect as legal terms of art.

Now there are some propositions which are perfectly clear which arise upon this will, and as to which I think there can be no doubt about the answer. It appears to me to be perfectly clear that the word "estate," before the new Wills Act, was a word sufficient to carry the fee if there was nothing at variance with that construcion upon the whole of the will. It would not

be a word of the vigour and force of a gift to a man and his heirs, but it would have the effect of carrying the fee equally unless there was something in the context which led one to a different conclusion. I take it to be also quite clear that that is so, even although in the same will, in another part of it, you find words of gift with words of inheritance superadded to the word "estate." I take it to be also quite clear that the word "child" or "children" is *prima facie* a designation of a person or persons; but at the same time it may be used as a *nomen collectivum*—popularly it is so used. There are many cases in which we speak of the children of a family or the children of a person, meaning to denote, not issue of the first generation, but issue generally. I take it to be also clear, as clear as anything can be in law, that the words "dying without issue," before the new Wills Act, are words pointing to a general failure of issue, and not a failure of issue at a particular time. I take it also to be clear upon the authorities that if you have a gift to children, with words of division or of inheritance, the children would take as purchasers; and then if you have a gift over in the event of death without issue, those words pointing to death without issue are to be construed referentially, and to have their explanation from the gift to the particular individuals that you have had before.

Now, upon those questions, as matters of law, I think there is no dispute, and I do not think there was really any dispute upon them in the argument of this case. The question is as to their application to the present case; and the crucial question which your Lordships have to solve is this: Did the testatrix mean to give her estate to the children or child of Thomas in fee as purchasers? For the purpose of determining this question, I hold it to be absolutely necessary that your Lordships should look at the whole of the will, and not at any particular sentence or clause of a sentence in the will. I speak with the most perfect respect and deference to those who take a different view from that which I have been able to take; but it does appear to me that the process by which the opposite conclusion is arrived at is something very like the process of a circular argument. I might state it thus: The word "estate" carries the fee-simple, and therefore where you have the gift of an "estate" to "children" in this will, it must mean a gift to the children in fee-simple: because it is a gift to the children in fee-simple, *ergo*, the word "children" cannot be a *nomen collectivum*: because the gift to the children is not a gift to them as a *nomen collectivum*, *ergo*, the gift over upon dying without issue must mean, not generally dying without issue, but dying without the children who are mentioned before. Now I might illustrate that by a circular argument in the opposite direction. If I begin at the other end you will have quite as good a circular argument backwards. Here is a gift over on death without issue—that means on the failure of issue generally; therefore, when you go back and find that preceded by a gift to "children," in order to make the two consistent the word "children" there must be a *nomen collectivum*, and must mean issue; and because you have a gift to children as a *nomen collectivum*, that is, to issue, *ergo*, they cannot take as purchasers in fee-simple, they take an estate tail. It seems to me that the circular argument is just as good in the one direction as in the other if you proceed upon the principle of putting a construction upon one clause without looking at the will as a whole.

Now before looking at the whole will with reference to the use of the word "children" here as to whether it is a word of limitation or purchase, there is one observation which I should like to make. It is quite clear that you have no words of division or words of inheritance in the technical sense of the term. You have the word "children" standing alone. Then you have a gift over upon death without issue, which I say means, *prima facie*, dying without issue generally; and then you have the word "estate," which I agree may carry the fee, but does not of necessity carry the fee-simple.

Now let us look for a moment at the whole of this very short will. I observe that it has been said that the rule in *Shelley's Case* (11), as it is called, is a technical rule, and that in considering whether you must apply the rule in *Shelley's Case* (11) you ought to proceed

as if you were dealing with a technical rule, and not to give way to technicality unless it be absolutely necessary. I am bound to say that, in my opinion, the rule in *Shelley's Case* (11) is not only not a technical rule, but it is the very opposite of a technical rule. It is a rule which has been established through a long course of decisions extending over a great many generations, and upon the ground, as I understand it, that it is desirable to avoid the effect of technicality. The foundation of the rule in *Shelley's Case* (11), as I understand it, is this: You have an indication of a general intention, which you gather from the whole of the will, that the estate shall travel through the issue generally of a certain person. You have that accompanied, no doubt, with a particular intention that the first taker shall take an estate for life; but in order to give effect, not to a technicality, not to a technical construction which would limit the first taker to a life estate, but to give effect to the general intention of the testator, and to make the estate travel through the issue generally, as the testator intended it to do, you apply the rule in *Shelley's Case* (11). Otherwise, if you do not do that, the consequence is that the only other resource which you have is to give to the head of the issue an estate by purchase, in which case it will not go through the issue generally, but only through the descendants of that particular head of the issue. Therefore I repeat that the rule in *Shelley's Case* (11) appears to me not to be a technical rule, but to be a rule of substance in order to give effect to the intention.

Now, the testatrix in this case was, as it is termed, an illiterate woman. No doubt she was in a humble position of life, and she had this little farm, which both sides state to be of the value of 14*l.* a year. I gather from the pecuniary provisions which she makes in her will, that her ideas altogether were of a most moderate kind. She had two sons, and she had at least five daughters, because five are mentioned in the will. With regard to the second son, she makes a pecuniary provision for him to the amount of 20*l.*; and she makes a pecuniary provision for the five daughters, so long as they remain unmarried, up to five years after her death—a provision which she puts at 3*l.* each annually. That would be a maximum of 15*l.* for each daughter, or 75*l.* for the whole five daughters, and 20*l.* for the younger son, making 95*l.* altogether. Assuming this estate to be worth 14*l.* a year, I take it that that was pretty nearly half the value of the whole estate. She provides, subject to certain details in the event of his dying inside fourteen years, in the first instance that the eldest son, Thomas, is to pay down all these sums, at least all that become payable, within a twelvemonth after her death; that is to say, the 20*l.* would become payable then, and the others would be payable *de anno in annum*.

That being the state of her family, the testatrix devises the property to her "eldest son Thomas Thomas," "during the term of his natural life, and after his decease to his legitimate child or children (if there be any); but if he dies without issue, my will is it may go unto my other son William Thomas, during the term of his natural life, and afterwards to his legitimate child or children (if any); but if he should likewise die without issue, my will is it may go to my daughter Mary Bevan, and to her heirs and assigns for ever." Well, I own (speaking again with great respect to those who entertain a different opinion) that the words which I have read seem to me to point, as clearly as inartificial and inaccurate words can point, to this idea, this current of thought in the mind of the testatrix—that her second son should have an immediate provision of 20*l.*, to be the representation of his benefit to be received from the property supposing that it did not come to him by the devolution which she had created, but that otherwise this little farm was to go through the family of her two sons, the parents taking first, and their children, in the sense of the collective term "issue," their family, taking after them. On the failure of the one family it was to go to the family of the second son, and on the failure of the family of the second son, it was to go to the first daughter, and then to stop. The process with regard to the daughter was to be perfectly different from the process with regard to the sons. The

testatrix had the idea of keeping the property in the family of the sons, and when it came to the first daughter, stopping it there: shewing that either she or the person who made the will understood perfectly well how to use the words which would give to the first daughter an absolute interest in the property, and put an end to any further devolution of it; but the property, until it came to the first daughter, was to devolve in a way analogous to what we call the devolution of settled estate. That seems to me to be the effect of the first part of the will; and, stopping there, I must say that I can conceive of nothing which would appear to me to be more at variance with what I collect to have been the intention than that, if Thomas were to have a son who might die in his infancy, and to have no further family, this estate should be found to have vested in fee-simple in that infant, and upon his death in infancy, to have gone over, as I suppose it would under the old law, to the second son of the testatrix (the very person, by the bye, who was to have a charge upon the estate) as if it were going in the course of devolution through the elder family. It appears to me that it would have given a perfect shock to the mind of this testatrix if she had been made aware that that would be the effect of the construction put upon the will by those who hold that the children of the first family took an absolute interest.

I have looked, also, through the second part of the will, the part which provides for what I may call the mode in which the charges are to be borne in the event of the death of Thomas and others within a particular limit of time. It is a very clumsy clause, and it is very difficult to put a consistent construction upon every part of it; but the clause being there, it does impress my mind in the strongest way that what was before the mind of the testatrix, or of whoever was making the will, was that the estate was travelling down a course of devolution like that of an estate tail. That, I think, is quite clear. The provisions are not such as would have been perfectly appropriate, but they are not consistent with any other idea. I might point your Lordships to the consequence which would happen upon any different construction. Suppose that Thomas had died in less than fourteen years after coming into possession of the estate leaving a child surviving him who had afterwards died, the estate would then have gone over to the second son; the second son would have had his 20*l.*, and Thomas would have had to pay the whole of the 20*l.*, because, as he left a child behind him (who might die any day), he would not be entitled to any contribution from the second son on his taking the estate. That shews the inartificial way in which the clause is framed, but it appears to me that the whole object of the clause was to provide for an apportionment, as it were, of the charges accompanying the devolution of the estate from father to children, and then from the family of the eldest son to the second son and his family. The opinion, therefore, which I have formed upon this case is, that the decision which was arrived at by the Courts below, the learned Judge before whom it first came and the Court of Appeal, is the correct decision, and therefore I should hope that your Lordships would confirm that decision, and that is the motion which I shall venture to propose.

I should like to say one word upon the subject of costs. I certainly have always held it to be a wholesome rule that the successful party in an appeal should have his costs and that the unsuccessful party should pay them; but of course there are occasional exceptions to this as there are to every other general rule, and, if your Lordships should agree with me, I should be very much disposed to suggest that your Lordships might think this a case for an exception, for this reason—the will is an extremely obscure one—your Lordships, I think, will be found to differ—you do differ—as to the construction to be put upon it. The case has been very fully considered here, and very fully argued, much more fully than in the Courts below, and I am bound to say that it does not appear to me to have had (judging from the report of what passed in the Courts below) the amount of consideration there to which it was entitled. The difficulty is a difficulty which was created by the testatrix herself, and not by the parties, and I am not altogether surprised that a further consideration of the case was

sought for by the unsuccessful party in the Court below. If this were a case in which there was a fund out of which the costs could be paid, a fund of the testatrix available for paying the costs, of settling the doubt which she herself has occasioned, probably that course might have been taken; but there is no such fund. I should very much like, if it met with your Lordships' approbation, to accompany the motion which I make with the addition that in this case there ought not to be any costs of the appeal. I move, however, in whatever is the proper form, that the conclusion which I have stated, and which, with great respect to the noble and learned Earl on the woolsack, is different from that at which he has arrived, be the decision of your Lordships upon this appeal.

LORD BLACKBURN.—The only report which we have of the reasons given by the Judges in the Court of Appeal is contained in the shorthand notes, not revised by the learned Judges. It is apparent on the face of those notes that the writer, not being acquainted with the subject concerning which the Judges were speaking, was unable to take a note of the sense of what the Judges said; and no shorthand writer, however skilful, can be expected to take an accurate note of the words used when he does not understand their significance.

I think it is probable that the Master of the Rolls was more influenced by the consideration that the person who drew the will, Mary Thomas, was a person unacquainted with the significance of legal terms, than I should think right.

Though I am not able from the notes to form an opinion as to what Lord Justice Cotton said, I am sure he could not have used the words taken down as what he said. They are not intelligible, and no one who knows the clearness with which that learned Judge expresses himself can for a moment suppose that he used unintelligible language; he seems to me to have given some weight to the want of skill of the person who penned the will, and I think that circumstance is not altogether to be rejected.

Lord Justice Bowen does not seem to have entered much on the reasons.

After the first argument of the case, I came to the conclusion that the decision of the Court of Appeal was right, though whether for the same reasons delivered by Lord Justice Cotton or not I cannot tell, as I do not know what were the reasons he delivered. But the Lord Chancellor has arrived at a different conclusion.

I need hardly say that I have read what he has written with great attention, and with a sincere desire to see where the difference of opinion really lay, and, I hope, with a candid wish to be convinced of my error, if it was one.

I have, since the second argument, made some alterations in what I had before written, and I wish to point out more distinctly than I could do before, what is the only point on which I think there is a difference in opinion between me and the Lord Chancellor, and why I still think that the judgment should be affirmed.

The respondent Lewis commenced this action on the 1st of March, 1881, to recover possession of a farm called Carvarchell, of which the appellant, John Keys Thomas, had taken possession on the death of Jane Catharine Thomas in 1879.

Both parties claimed under the will of Mary Thomas, made in 1820, in which year she died. The construction of that will, therefore, is not affected by the 28th or 29th sections of the 7 Will. 4. and 1 Vict. c. 26.

Mary Thomas at the time of her death was a widow, having two sons, Thomas Clement Thomas, the eldest, whom in her will she calls Thomas Thomas, who at the time of her death was unmarried, and who, though he after her death married, never had any children; he died in 1862. She had a second son, William, who died in 1874, leaving two children, the appellant John Keys Thomas, and a daughter Catharine. We are not told when these children of William were born, but in the absence of any statement to the contrary, I think we should, from the language of the will which I shall presently quote, infer that William had not any children at the time when the will was made. The testatrix had also six daughters then living, one of whom was Mary Bevan. I do not think there is anything else in the state of the testatrix's family which is

material. The testatrix, at the time she made her will, and at the time of her death, was seised in fee of the farm in question, which is of a freehold tenure. It was then, and still is, let for 14*l.* a year. We are not told anything more about her other property, but from the nature of the provisions in her will it must have been small.

I think it convenient now to read the material part of the will of Mary Thomas: "I give and devise unto my eldest son Thomas Thomas all my real and freehold estate, and all leases and leasehold premises now in my possession (subject to the payment of the rents and the performance of the covenants mentioned in the said indentures of leases), during the term of his natural life, and after his decease to his legitimate child or children, if there be any; but if he dies without issue, my will is it may go unto my other son William Thomas during the term of his natural life, and afterwards to his legitimate child or children, if any; but if he should likewise die without issue, my will is it may go to my daughter Mary Bevan, and to her heirs and assigns for ever."

Then followed some pecuniary legacies, which I think do not throw any light on the construction of what went before.

On the second argument it was pointed out that some expressions in this part of the will had a tendency, so far as they went, to favour the construction that Thomas took an estate tail. I do not, however, rely on those. She made her son Thomas residuary devisee and legatee, and appointed him her executor.

I think that in construing a will we are to enquire what is the intention of the testator shewn by the words of the will, and that we ought to enquire into all relating to the property and state of the family, and, in short, into all the circumstances which the testator would or ought to consider when making his will, and then say, not what was the intention expressed by such words in the abstract, but what is the intention expressed by such words used with reference to such circumstances.

I do not think that I could in any way better express what I think are the rules of construction than in the words of the judgment in the Privy Council delivered (and probably written) by Lord Kingsdown in *Towns* v. *Wentworth* (5), to which I refer. It is there said, "The application of these rules is often attended with very great difficulty, as the number of cases found in the books upon the subject, not always very easily reconcilable with each other, sufficiently testifies; but in the present case (that is, that before the Privy Council), their Lordships do not think their application attended with any serious difficulty."

In the present case, I mean on the construction of the will before this House, I think there is serious difficulty.

I do not think it too much to say that the only thing that is perfectly clear on this will is, that the testatrix intended to give her son Thomas a life estate in this farm.

The person, whoever he was, who framed the will (for I do not suppose the testatrix penned it herself) has been singularly unfortunate in the choice of ambiguous phrases, from which it is very difficult to say what intention was expressed. I am quite sure Mary Thomas did not understand them, nor do I think the person who framed the will did. But the Court must, I think, construe the will according to the proper meaning of those phrases, unless there is something in the context or the subject-matter to justify a departure from that meaning.

A conveyance to a person without any words of limitation gives him no more than an estate for life; and in wills not affected by 7 Will. 4. and 1 Vict. c. 26. s. 28, the same rule applied where the land was devised. But when the testator was owner of the fee, and used any words which, reasonably interpreted, shewed that the intention was to devise the inheritance which he had, effect was given to his intention; the inheritance passed, though there were no words of limitation attached, to the objects of the testator's bounty.

The devise of "all my freehold estate" may mean the "farm" of Carvarchell, which is of freehold tenure; or it may mean "the estate which I have in Carvarchell—that is, the fee-simple and inheritance in that farm."

It is immaterial, as far as regards the

estates given to Thomas and William, what meaning is put on these words, for their estates are by express words confined to life estates; and it is immaterial as to the estate given to Mary Bevan, which is by express terms made a fee-simple; but the question what is the intention expressed by the clause "and after his (Thomas's) decease, to his legitimate child or children (if there be any); but if he dies without issue, my will is it may go to my other son," may be affected by these words.

I may here say at once that I agree with the Lord Chancellor, and, as I think, with Lord Justice Cotton, and in that respect, I think, differ from the Master of the Rolls, that if the devise had been to "Thomas of all my real and freehold estate during the term of his natural life, and after his decease to his legitimate child and children, if there be any," and had stopped there, the words would have been quite sufficient to give the children a fee. But I still differ from the Lord Chancellor in thinking that the construction of the clause which follows is not affected by these words, and that the devise to William is not thereby made contingent. I shall return to this later.

There was also in wills not affected by 7 Will 4. and 1 Vict. c. 26, s. 29 an effect given to a devise over after the death of one to whom an estate for life was given, "if he die without issue." *Prima facie* these words meant on an indefinite failure of his issue, and are exactly equivalent to "on the extinction of the heirs of his body," and that is held by implication to express an intention that the heirs of the body of the devisee for life shall take. They cannot take as purchasers; and therefore these words are construed as words of limitation, and give the devisee for life an estate tail. But if there be enough on the face of the will to shew that the words "die without issue" do not mean on an indefinite failure of issue, but are, by the context or other legitimate grounds of construction, shewn to have been used as meaning "if no such issue shall be born," or "never having had issue," or "die without leaving issue living at his death," the will might be construed according to the meaning. Before 1837 the presumption was against such a construction; but it was only a presumption.

Lastly, the words "child or children" primarily mean issue in the first generation only, sons and daughters, to the exclusion of grandchildren or other remoter descendants. Here also, if there is enough to justify the construction, the words may be read as equivalent to issue or heirs of the body; but it requires something to justify the reading the words in what is not their primary sense.

Now the person who drew this will has (without, I should say, thinking what their effect was) used all these phrases. And I think there are three constructions, and no more, that may plausibly be put on the will.

The testatrix has expressed clearly her intention to be that Carvarchell should go to Thomas for life. It is to go after his death according to the intention expressed on the will. She may be held to have expressed—first, an intention that it should go to the heirs of Thomas's body, and when they died out to William for life, then to the heirs of his body, and when they died out to Mary Bevan in fee; secondly, an intention that it should go to the children (in the sense of the sons and daughters) of Thomas, if any there should be, as joint tenants for life, and subject to this life interest, contingent on some such child being born, to the heirs of the body of Thomas, including grandchildren and remoter descendants, and when they died out to William for life, then contingently to his children as joint tenants for life, then to the heirs of William's body, and then to Mary Bevan in fee.

If either of these two constructions is adopted, Thomas took an estate tail prior to the estates given to William and his children and to Mary Bevan, and by barring that estate tail acquired the fee-simple, and the respondent is entitled. As he never had children, the contingent life estate given on the second construction to them never came into operation.

The third construction is that she has expressed an intention that on the decease of Thomas the fee should go to Thomas's children (contingently on any being born) as joint tenants in fee-simple; and if no such child was born, then, as an alternative contingent devise, to William for life, and on his decease to William's children (con-

tingently on any such being born) as joint tenants in fee-simple, and as an alternative contingency, if no child of William was born, to Mary Bevan in fee-simple.

I see no fourth construction that can possibly be put on the will; and there are objections to all three.

The first construction puts on the words "child or children" the meaning of issue so as to include all heirs of the body of Thomas. It is very likely that the testatrix, if asked whether she meant by those words to include grandchildren or remoter descendants of Thomas, would have said she did; but I see nothing on the face of the will to justify the Court in putting this more extended meaning on the words; and I therefore reject the first construction.

The second construction gives the *prima facie* meaning both to the word "children" and to the phrase "die without issue." By it the testatrix gives a life interest as joint tenants to the children of her son. She had herself eight children living when she made her will, and she must therefore, if she had reflected, have known that her sons might have so many children that, if they took this small property as joint tenants for life, they would only have a few shillings a year each. And this would be so inconvenient a disposition of the property that, I think, if her attention had been called to it, she would not have made such a disposition.

In the event that has happened of Thomas never having children this has produced no effect; but I scarcely see how the will can be read so as to avoid saying that such is the disposition made; and I therefore adopt this second construction.

I daresay that she did not know that Thomas, if a tenant in tail, would have power to acquire the fee-simple. If she did know it, I daresay she did not wish him to exercise that power; perhaps she might have hoped that he, the object of her bounty, would respect her wishes, and not exercise the power without some sufficient reason. I cannot speculate as to this.

I do not think that, since the decision of this House in *Roddy* v. *FitzGerald* (9), it is open to dispute that a rule is established. Whether we word the reason for it as Lord Eldon did in *Jesson* v. *Wright* (13), or, as Lord Wensleydale prefers it, as it was expressed in *Doe* v. *Galini* (28), the rule is established that if a testator does express an intention that A shall have the estate for life, and on the failure of the heirs of the body of A the estate shall go over, the effect is that an estate tail is given to A by necessary implication, as otherwise all the subsequent limitations would be too remote. Lord Cranworth says, in *Roddy* v. *FitzGerald* (9), that one cannot but feel that, in many cases, the real wish of the testator, instead of being carried into effect, is defeated by this rule. And I think this is true; but in this case the third construction would be likely to still more defeat her probable wishes.

It is no doubt very likely that Mary Thomas did not know that her son Thomas, if he took an estate tail, could, by barring it, acquire the fee-simple. And if the matter had been explained to her she might have devised Carvarchell to her sons Thomas and William in strict settlement, with remainder to Mary in fee. That would, I think, have come as near to what she probably wished as the rules of law permit. But that she certainly has not done. She might have made the disposition which I have called the third construction, and no doubt by so doing she would prevent Thomas from barring the entail. That is what it is said she has done; but it is so eminently injudicious that I think she could never have wished to do it. She herself had eight children living at the time of her death. She must have known that Thomas might have as many or more, and could hardly have wished to give so many persons a joint interest, either for life or in fee, in so small a property.

In the not improbable event of Thomas having one child, who died soon after his birth, and never having any other, the estate in fee would, on the birth of that child, vest in it, and on its death vest in its heir, defeating the subsequent estates as effectually as if Thomas took an estate tail and barred it. In the not improbable event of Thomas having two or more children, one of whom married and died in the lifetime of Thomas, leaving a surviving

(28) 5 B. & Ad. 621; 3 Law J. Rep. K.B. 71.

brother or sister and also issue, the issue would, unless steps had been taken before its parent's death to sever the joint tenancy, be wholly disinherited. The testatrix could never really have wished to do all this, if she understood its effect; but no doubt she may have said so, and then, however injudicious we may think her will, we must carry it out. But we ought not to strain the words used even to produce a reasonable result; certainly not to produce a foolish one.

If there was a sufficiently expressed intention to give the children estates in fee, it would be enough to justify putting on the words "die without issue" the sense "die without having had such issue" —that is, a child—at all. Or rather the authorities cited by the Lord Chancellor, I think, would require us to put that construction on those words. Therefore, as it seems to me, the difference of opinion between the Lord Chancellor and myself is reduced to the small but not easy question: Is there a sufficiently expressed intention to give the children an inheritance? —sufficiently expressed to justify the Court in altering the meaning of the expression "but if he dies without issue" from its primary meaning. I notice, without relying on them, that it is in many cases said that, to do so, the intention should be "clearly expressed"; I prefer to say "sufficiently expressed."

It seems to me that such an intention is not expressed at all, unless the fact that the devise is of the fee-simple necessarily shews an intention to give the children a fee-simple. Now I think that a devise of the fee-simple of a particular estate to A, and after his decease to B, was enough (before 1837) to give B, the ultimate devisee, the inheritance. But I do not think a devise of the inheritance to A, and after his decease to B, and then to C, could be held to shew an intention to give the inheritance to B, though it would shew an intention to give it to the ultimate devisee. Still less could a devise to A, and after his decease to B, and then to C and his heirs, shew any intention to give B the inheritance which is expressly given to C. And I have been unable to see any reason why it should be different if B is described as being the unborn child of a designated person, whose estate is therefore necessarily contingent till such a child is born. I think the testatrix, if she had been told that "If either Thomas or William has a child who dies an hour after its birth, and Thomas and William both die without any more children being born to either, neither Mary Bevan nor her heirs will, under the will as you have worded it, take anything," she would have said, "That is not what I wished or meant to say." I think it is not what she has said.

In *Wilkinson* v. *Chapman* (20), which was relied on on behalf of the appellants, the estate was given first to the testator's daughter, but he added "her heirs and assigns," and no doubt could arise that she took in fee, whether the word "estate" meant land or inheritance. And then, on the contingency of her dying under age and without lawful issue, he devised his estate to his wife for her life; so that, whether the word "estate" meant land or inheritance, she took only for life, and then the ultimate devise was to the children of John Hipworth, late of Walcot, to be equally divided among them, share and share alike, as tenants in common. From the report of the case, I infer that John Hipworth was dead when the will was made, and that the "children" of John Hipworth was a designation of five persons then alive; it was held that those five persons, the ultimate devisees, took the inheritance. In the present case, the person who drew the will has raised the very same difficulty which Lord Gifford afterwards points out. "The freehold estate" is given to Thomas, and afterwards to William for life only, and it is ultimately given to Mary Bevan in fee. Lord Gifford held that the intention appeared to give the inheritance to the ultimate devisees. But I cannot think this case an authority for saying that, where the ultimate devise is in fee, the intermediate estate, given without any words of limitation, is to be enlarged into an estate of inheritance, but only that the ultimate devise, if not expressed to be in fee, is so to be enlarged.

And I also think that, if there is a devise of the inheritance to A for life, and then that the inheritance shall go, on one contingency, to B, and, upon the contin-

gency of the devise to B not taking effect, to C, there would be enough to give B or C, as the case might be, an estate in fee-simple; and I do not think that would be different if the words of limitation were appended to the alternative devise to C, and not to that to B, or *vice versa*. That is what I understand to be decided in *Montgomery* v. *Montgomery* (12).

But I do not think there is either principle or authority for saying that the use of words importing that the inheritance is to be disposed of is to have any effect on the question whether the devise is in an alternative contingency in fee or not. If there is enough to shew an intention to give the children an estate in fee, then it follows that the subsequent devise is an alternative contingent devise; and the words are enough to give effect to the intention to give the children an estate of inheritance.

But here I have failed to see anything to justify us in reading the words used by the testatrix in any other than their primary sense. I therefore reject the third construction.

It is not material whether the first or second construction is adopted. Either way the order appealed against is right. But I think the second is the true construction.

I think the appeal should be dismissed.

As to costs, I do not at present think it necessary to say anything as to what should be done about costs. I will only observe that I fear the parties have no interest whatever in that question. The whole money value of the little property, and much more, must have been spent in litigation.

LORD BRAMWELL.—This is one of a class of cases to which the ordinary rules of construction do not apply—I mean the rules that the intention of the testator is to govern—and that intention is to be ascertained from the meaning of the words he has used. The rule in *Shelley's Case* (11) has to be considered—a rule which may have had some reason in it when it was invented, but which when applied almost invariably frustrates the intention of the testator, which ought to be ascertained. A rule of construction has to be adopted as to wills of the date of that in question, confessedly wrong, and condemned by the Legislature, and reasoning is used, in my judgment, wholly erroneous—namely, to suppose a testato rcontemplates all the possible consequences of various interpretations, and then to say, if there is one he would not have meant if he had thought of it, that he did not mean what he has plainly said; not bearing in mind that in many cases he had not thought of the consequence, and had, therefore, no intention as to it one way or the other, and a particular expressed intention is disregarded in favour of some supposed general intention.

If ordinary rules governed this case, and I did not know that contrary opinions were held, I should say it was very plain—not speaking presumptuously, but with a perfect consciousness that this is one of a class of cases with which I am not familiar. I will give my reasons. The testatrix gave Thomas an estate for life; in words and in intention she affirmatively gave no more, negatively she meant to give no more. She gave to his child, if he had one only—to his children, if more than one—an estate in fee-simple. My reasons for saying so are these. She was dealing with the fee-simple. She speaks of her real and freehold estate. She accompanies it with a gift of "all leases, &c.," using language to pass the whole property, if she had any. She says afterwards that if that devise fails "it" may go to William for life, &c., and if those devises fail "it" may go to Mary Bevan in fee-simple. The "it" is the "real and freehold estate"—that is, the fee. Now, I understand that it is admitted that if there was nothing else there would have been a fee-simple given to the child or children of Thomas. As to the argument that, if so, and a child had been born to Thomas and died, Thomas would have been its heir, which she did not intend, the answer is, she did not intend the contrary. She never thought of it. But there is something else, and, as was said by the noble and learned Earl opposite (Earl Cairns) during the argument, the whole must be taken together; and it would be as great a mistake to take one part and say it shewed a fee-simple, and then disregard the rest, as it would

be to take the other part and say it shewed an estate tail, disregarding the first part.

Now, the other matters are these. There is the devise to Mary Bevan, "her heirs and assigns for ever." It is said that this shews she knew how to create a fee-simple, and that she would have put in these words of inheritance had she meant to give an estate of inheritance to the child or children of Thomas. This was hardly insisted on by Mr. Rowlands. I am of opinion there is no foundation for it. Whoever drew the will thought, when he came to the ultimate devise, it was right to put in "heirs and assigns for ever," and did so. He did not think it necessary to put these words in before. It is impossible, on a speculation of this sort, to disregard otherwise plain language.

Another matter relied on is this. The testatrix says, "but if he (Thomas) dies without issue, my will is it may go," &c.; and it is said this means an indefinite failure of issue, which shews that the testatrix was giving an estate tail to the issue of Thomas. I think not, for these reasons. It compels the leaving out of the words "child or children," or the substituting for them of the words "issue," or adding after "children" the words "in succession," or some such expression. Further, in a subsequent part of the will, the testatrix, speaking of Thomas, uses the words "leaving no issue" to signify leaving no issue at his death. The argument comes to this: As I have said, the will down to "but," after "if there be any," &c., gives a fee-simple as plainly as though the words "their heirs and assigns for ever" had been after the word "children." If these had been there the subsequent words would not have affected them, yet an equivocal expression following them is to control and supersede a plain expression, and give it a different meaning, with this result: that if Thomas had not barred the entail his eldest son would have taken, to the exclusion of daughters and other sons. Leaving out the effect of the word "estate," if the words "child or children" stood alone, then, by virtue of a long-established rule in a will of this date, an estate of inheritance would not be given, leaving out the question as to the effect of the word "estate"; but it does seem strange that those words, not standing alone, but being part of a long sentence, the entire sentence is to be wrongly construed, there being no rule to compel that.

On these considerations I think the judgment wrong, and that it should be reversed. As to the actual intention of the testatrix, with all submission, I have not a doubt. Whether it is interpretation, or guess, or speculation, it is clear to me that she meant the child or children of Thomas to take the realty out and out, as they would have taken a lease had she had any, or 1,000*l.* Consols if she had them, and they had been mentioned after "premises." I must add that, as well as I can understand the cases, they favour my view. None seems opposed to it.

LORD FITZGERALD.—When such very great authorities as the noble and learned Lords who have preceded me differ in opinion, I need not say that I express mine with diffidence and hesitation.

The question immediately before us is, whether the devise after the decease of Thomas "to his legitimate child or children (if there be any)" would give them an estate in fee as purchasers, or an estate for life only. If that devise conferred on them an estate in fee-simple as purchasers—that is to say, an absolute fee-simple—it could not be denied that the appellant is entitled; but if the children, if any, would take an estate for life only, then it is equally conceded that Thomas took an estate tail by implication, and the respondent is entitled to your Lordships' judgment.

We may well say with Lord Wensleydale in *Roddy* v. *FitzGerald* (9) that "the present case is of consequence, not from the value of the property at stake, but on account of the paramount importance of adhering to fixed principles of decision, which affords the only chance of attaining a reasonable degree of certainty in the construction of wills." It was because of its great importance in that view that the noble and learned Earl on the woolsack directed a re-argument of the case, so as to secure further deliberation and give greater weight to the decision of this House.

Lord Eldon is reported to have said in *Jesson* v. *Wright* (13) that his mind was overpowered by the cases and the subtlety of the distinctions between them. How truly I may apply that language to myself in the present instance; but from an early stage of the argument I have been of opinion that the decision in the Courts below was correct and should be upheld, and I am obliged to confess an almost superstitious veneration for the rule in *Shelley's Case* (11), and for *Jesson* v. *Wright* (13) and *Roddy* v. *Fitz-Gerald* (9).

We are, no doubt, to endeavour to reach the meaning of the words the testatrix has used, and to give effect to her paramount intention. Collecting, then, her predominating general intention from the context of the will, I cannot doubt that intention to have been that the estate should go in the first instance to Thomas and his issue, and should not pass over to William until the line of Thomas's descendants had been completely exhausted.

We are bound, if we can consistently with the language of the will, to give effect to that general intention.

There is no doubt that "all my real and freehold estate" may be sufficient to confer a fee-simple; but "estate" is a term the meaning and use of which must be determined by the context, and it does not follow that because the testatrix was dealing with and intended to deal with the inheritance, and may have used the term as representing, not only the farm itself, but the inheritance in that farm, therefore she is to be taken to have expressed an intention to give the children of Thomas (if any) the whole of that inheritance in fee. A very eminent Judge, one of the learned Judges who answered the questions put by your Lordships' House, made an observation in *Roddy* v. *Fitz-Gerald* (9) which is peculiarly applicable here. He there said, "The testator did not intend that if a child was born to William, and lived a few hours, such child should take so as to confer a title on his heirs." Substituting "Thomas" for "William," the sentence is exactly applicable to the present case. That eminent Judge used the expressions I have quoted in somewhat a different sense, and if he erred then in his conclusion, and if my noble and learned friend beside me (Lord Bramwell) has erred now in his opinion, he has erred on both occasions in very distinguished company. If there had been nothing more in the will after the words "to his legitimate child or children" there could be no question but that the children would take the inheritance in fee; but we must interpret the devise to them by the words which immediately follow—"but if he dies without issue." That sentence is a sentence of art, on which a meaning is put by the highest authorities, and from which it is not desirable we should depart on speculation. We had better adhere to great rules than raise any nice distinctions to enable us to vary from them.

"Issue" is, no doubt, not so rigid as "heirs of the body," and may be interpreted as a word of purchase or a word of limitation, as may best effectuate the general intention; but the sentence "if he dies without issue" is one of art, and, as interpreted by authority at the time this will was made, meant *prima facie* an indefinite failure of issue. I can find nothing in this will to induce me to depart from that meaning or to lead to the conclusion that "issue" should be interpreted as "children." The meaning of the sentence is, I think, shewn, and the pervading intention indicated, by that subsequent portion of the will which commences, "But this bequest and devise is nevertheless subject to the following payments and restrictions," and in which the testatrix uses the expressions "and leaving no issue" and "should his successor die without legitimate issue," and indicates very clearly to my mind her general and paramount intention that Thomas's "successor" William was to take only on the exhaustion of Thomas's line of descendants, and that Mary Bevan's line was to succeed only on failure of William's line.

I have to apologise for having said even these few words. I do not intend to criticise the authorities, nor can I usefully do more than state my general conclusions. It seems to me that "if he dies without issue" must be interpreted as pointing to an indefinite failure of issue, and that on the true construction of this will the estate would go to the children of Thomas

for life only, and subject to that life-interest to the descendants of Thomas, and on failure of Thomas's line then to William. The consequence is that Thomas took an estate tail by implication, and he having barred that estate and acquired the fee, the plaintiff is entitled.

Order appealed from affirmed, and appeal dismissed, without costs.

Solicitors — Speechley, Mumford & Landon, agents for Johnson & Stead, Llanelly, for appellants; Crowder, Anstie & Vizard, agents for J. M. Williams, St. David's, Pembrokeshire, for respondent.

[IN THE COURT OF APPEAL.]

BANKRUPTCY. 1884. Dec. 5. } *In re* HASTINGS; *ex parte* DEARLE.*

Bankruptcy — Petitioning Creditor — Bare Trustee—Joinder of Beneficiary—Notice of Judgment Debt—Amendment—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4. *sub-s.* (*g*), *ss.* 5, 105, *sub-s.* 3—*Bankruptcy Rule* 263.

A petition presented under section 5 *of the Bankruptcy Act*, 1883, *by a creditor, who is not the beneficial owner of the debt, on the strength of an act of bankruptcy committed under section* 4, *sub-s.* (*g*), *by non-compliance with notice of a judgment recovered by him, must include, as a petitioning creditor, the beneficial owner of the debt, although the bankruptcy notice need be in the name of the judgment creditor only.*

Appeal of the petitioner from the order of Mr. Registrar Brougham dismissing the petition.

The petitioner had obtained final judgment against the debtor, and had served a bankruptcy notice on him in accordance with the Act. The debtor had not complied with the requirements of the notice.

It appeared that the petitioner was the brother of Ada Dearle, who had some time previously entrusted money for investment to a firm of solicitors, against whom judgment had been obtained by her for the money. Garnishee orders were made against debtors of the solicitors, and thereupon, in consideration of Ada Dearle abandoning the garnishee orders, the debtor guaranteed to pay the petitioner, on behalf of Ada Dearle, the sum due from the solicitors. The judgment in respect of which the bankruptcy notice had been served was obtained on that guarantee.

The Registrar dismissed the petition on the ground that Ada Dearle was not a party to it.

E. Clarke, Q.C., and *R. Wallace*, for the petitioner.—The petition was dismissed on the authority of *In re Adams; ex parte Culley* (1), in which it was held that the old rule in bankruptcy—that the legal and beneficial owner of the debt must concur in petitioning—had survived the Bankruptcy Act, 1869, and the Judicature Act, 1873. The rule, however, does not apply to petitions presented on an act of bankruptcy committed under section 4, sub-section (*g*), of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52). The petitioner is the "creditor" referred to in that sub-section, and a notice given by him jointly with Ada Dearle would have been a bad notice, because she was no party to the judgment. The petitioner is also the "creditor" referred to in section 5 as one of the persons who may petition. The new Act is inconsistent with the old practice. If the Court is of a contrary opinion, the petition may be amended.

Cooper Willis, Q.C., and *E. J. Davis*, referred to rule 263 of the rules made pursuant to section 127, which provides that where no other provision is made by the Act or the Rules the present law procedure and practice in bankruptcy matters shall, in so far as applicable, remain in force. As to amending, it would be necessary to amend the bankruptcy notice, which the Court has no power to amend.

LORD COLERIDGE, C.J.—I am of opinion that the appeal must be dismissed. It was a general rule before 1869 that a mere trustee could not petition without his *cestui que trust* if he was capable of dealing with the debt. There was a good

* *Coram* Lord Coleridge, C.J., Brett, M.R., and Lindley, L.J.

(1) 47 Law J. Rep. Bankr. 97; Law Rep. 9 Ch. D. 307.

reason for the rule, because there might be a debt to which the debtor had no defence as against the trustee, but had a good defence as against the *cestui que trust*. The Act of 1869 allowed equitable debts to found a petition, and in 1875 the Judicature Acts came into operation. In 1878 it was contended that as equitable debts were recognised, and as law and equity had to be concurrently administered, the reason of the old rule failed. This argument was, however, overruled in *In re Adams; ex parte Culley* (1). It was said here to-day that the rule was put an end to by section 4, sub-section (*g*), of the Bankruptcy Act, 1883, allowing a creditor with a final judgment to bring about an act of bankruptcy. The petitioner was competent to obtain the judgment which he obtained, but who is to take advantage of the act of bankruptcy which follows? The 5th section shews tolerably clearly that the judgment creditor and the petitioning creditor need not be the same person. "A creditor" in section 5 means any creditor. The same rule which existed previously exists now, unless there are express words to take it away. It is true that there was a new Bankruptcy Act in 1883, but there was also a new Bankruptcy Act in 1869. The only remaining question is whether we can allow an amendment under section 105, sub-section 3. A not unnatural blunder has been made, and a not unreasonable view taken. There has been a slip. It is right that on proper terms we should amend the petition, that is to say, on the consent of Ada Dearle to join being obtained, and the appellants paying the costs of the appeal and of the amendment. On that understanding the appeal must be dismissed.

BRETT, M.R.—There is a good petitioning creditor's debt, and a good act of bankruptcy. The proper notice was given by a judgment creditor. Non-compliance with that notice is the act of bankruptcy. It is said that this notice is wrong; but it does not seem to me that the old principle affects the notice. The trustee may give the notice alone, although adding the beneficiary to the notice would not make it bad. It would be surplusage, but it is not necessary. I remain of the same view as in *In re Adams; ex parte Culley* (1). The rule of practice was that where the petitioning creditor was a bare trustee the *cestui que trust* must be joined. It was a rule of conduct founded on principle. There might be no debt due because the *cestui que trust* might have been paid or have released the debt. The reason for the rule remained after 1869, and still remains. In 1869 there was a new Bankruptcy Act, and there were no negative words. The same arguments as in this case were used in that case, and it was held that the old rule survived. The mere fact of the Act dealing with the debt did not alter the old rule. This Act invents a new debt and new act of bankruptcy, but there is not a word affirmatively or negatively providing who shall be a petitioning creditor. The argument is now much stronger than then, because the Legislature, knowing of that case, would have dealt expressly with the subject if it had intended an alteration. The trustee alone cannot be a good petitioning creditor. As soon as there is a good debt amounting to an act of bankruptcy, any creditor may petition.

LINDLEY, L.J.—For a hundred years it has been the rule that the *cestui que trust* must join in the petition for the protection of the bankrupt. The difficulties which arose as to the wording of the Act of Parliament were considered under the Act of 1869, and it was held that the old rule prevailed. It is said that the Act of 1883 makes a difference; but section 5 means that any creditor may petition. If another person than the judgment creditor were to petition there would be no reason at all why the *cestui que trust*, if any, should not join. It comes to this therefore, that we are asked to make two rules — one, that where the judgment creditor petitions on the judgment debt as the act of bankruptcy, the *cestui que trust* need not join; another, that where some one else petitions on the same act of bankruptcy, the *cestui que trust* must join.

Appeal dismissed; petition amended.

Solicitors—John G. Dearle, for petitioner
Benn Davis, for debtor.

[IN THE COURT OF APPEAL.]

1884. Dec. 2, 3. } DALLOW *v.* GARROLD. *Ex parte* ADAMS.*

Solicitor and Client—Charging Order—Garnishee Summons—Priority—Lien—23 & 24 Vict. c. 127. s. 28.

The amount of the debt and costs recovered by a plaintiff in an action had been levied, and were in the hands of the sheriff, when a judgment creditor of the plaintiff took out a garnishee summons to attach this money. After the summons was taken out, but before any order was made thereon, the solicitor who had acted for the plaintiff in the action, the proceeds of the judgment in which it was sought to attach, obtained under 23 & 24 Vict. c. 127. s. 28, from a Judge at chambers, an order charging in his favour the money in the hands of the sheriff. The judgment creditor applied to set this order aside:—Held, *affirming the judgment of the Queen's Bench Division, that the charging order had priority and ought not to be set aside, that the judgment creditor who had taken out the garnishee summons was not a bona fide purchaser for value within 23 & 24 Vict. c. 127. s. 28, and that the word "property" in that section included both the debt and the costs recovered in the action.*

Appeal by the judgment creditor from the judgment of the Queen's Bench Division.

The case is reported 53 Law J. Rep. Q.B. 527.

The plaintiff Dallow had recovered, in an action against the defendant Garrold, the amount of 10*l.* 8*s.* 11*d.*, being the balance by which the sum found to be due to the plaintiff exceeded a counter-claim established by the defendant. The plaintiff's taxed costs of the action amounted to 156*l.* 11*s.* 11*d.*, and the defendant's costs of the counter-claim amounted to 58*l.* 12*s.* 8*d.*, leaving a balance of 97*l.* 19*s.* 3*d.* costs payable by the defendant. A *fi. fa.* having been issued on the 1st of April, 1884, against the defendant's goods, a sum of money was on the 7th received by the sheriff thereunder amounting to 111*l.* 16*s.* 2*d.*, made up as follows—namely, 10*l.* 8*s.* 11*d.* judgment debt, 97*l.* 19*s.* 3*d.* costs payable to the plaintiff, 2*l.* 2*s.* interest, and 1*l.* 6*s.* costs of execution.

On the 8th of April a garnishee summons from the County Court of Hereford was served on the sheriff on behalf of a person named Davies, who had obtained a judgment against the plaintiff Dallow for 8*l.* 8*s.* 10*d.* in that Court, attaching all debts due to Dallow to answer that judgment. This summons was returnable on the 27th of May. On the 18th of April the sheriff gave notice to the plaintiff's solicitor of the receipt of the money under the execution and the service of the garnishee summons. On the 3rd of May the sheriff paid to the plaintiff's agents 101*l.* 7*s.* 3*d.*, retaining 10*l.* 8*s.* 11*d.* out of the proceeds of the execution. On the 14th of May Adams, the plaintiff's solicitor in the action of *Dallow* v. *Garrold*, gave notice to the sheriff of his claim to a charge on the sum retained in respect of 58*l.* 12*s.* 8*d.*, the balance of taxed costs remaining due to him.

On the 27th of May the hearing of the garnishee summons was adjourned till the 24th of June. On the 11th of June an order under 23 & 24 Vict. c. 127. s. 28 was made by Denman, J., on the application of Adams, the plaintiff's solicitor, charging the fund recovered with the costs due to him. On the 24th of June the garnishee summons came on for hearing; but the County Court Judge, on production of the charging order, did not make any order thereon, and directed the sheriff to retain the money for twenty-eight days to give time for an application to set aside the charging order. An application was accordingly made to Smith, J., at chambers to set aside the charging order, who made an order setting aside the charging order on the ground that the claim of the judgment creditor who had served the garnishee summons was entitled to priority over the solicitor's claim for costs. The solicitor who had obtained the charging order appealed to the Queen's Bench Division, and his appeal was allowed. The judgment creditor now appealed from the judgment of the Queen's Bench Division.

W. E. Hume Williams, for the appellant Davies, the judgment creditor.—A charging order made under 23 & 24 Vict. c. 127.

* *Coram* Brett, M.R., and Lindley, L.J.

s. 28 (1), is not retrospective; and even if it were, still it would not be valid against a *bona fide* creditor for value. If the solicitor's lien enabled him to follow the fund recovered into whose-ever hands it passed, then there was no necessity for the enactment contained in section 28. A person who gets a garnishee order is a *bona fide* purchaser for value within the meaning of section 28.

[LINDLEY, L.J.—In *Beavan* v. *The Earl of Oxford* (2) it was held that a judgment creditor is not a purchaser within 27 Eliz. c. 4.]

In *Birchall* v. *Pugin* (3) the attorney was the first to take steps to attach the money by taking out the summons for the charging order, and it was held that as he had done so he was entitled to priority; but in the present case the judgment creditor took out the garnishee summons first. *Shippey* v. *Grey* (4) and *Faithfull* v. *Ewen* (5) do not govern the present case, for the facts of the three cases are not identical. At the time the charging order was made the money was due, not to the plaintiff, but to the execution creditor, so that there was not even an equitable interest which could be attached. The charging order was made by the wrong Judge. The case was opened before Lopes, J., who referred it; and he ought to have made the order, whereas it was made by Denman, J., at chambers—*Higgs* v. *Schrader* (6).

[BRETT, M.R.—The statute says the Court or Judge before whom the matter has been heard or is depending. Lopes, J., did not hear the case, and a case is depending before the Court, and not before a particular Judge.]

The money recovered was a total sum of debt and costs, so that the sheriff could not distinguish between the debt and the costs; and costs recovered are not property within section 28.

Hamer v. *Giles* (7), *Hough* v. *Edwards* (8), and *Eisdell* v. *Cunningham* (9) were cited.

Hollams, for the respondent, was not called on.

BRETT, M.R.—This is a case in which a solicitor has, while acting on behalf of a client, recovered a judgment debt and costs. It has been argued that the costs are not "property recovered" within 23 & 24 Vict. c. 127. s. 28; but it seems to me that the phrase, "property of whatsoever nature, tenure, or kind," is the largest expression which could be used, and that it includes all that has been recovered by the exertions of a person acting as a solicitor. The amount of this debt and these costs came into the hands of the sheriff. This being so, another party, a judgment creditor, took out a garnishee summons in order to attach the property thus recovered. A charging order was afterwards obtained at chambers declaring that the solicitor was entitled to a charge upon the property so recovered, which was then in the hands of the sheriff, and the question is raised whether the solicitor has under that order a

(1) 23 & 24 Vict. c. 127. s. 28: "In every case in which an attorney or solicitor shall be employed to prosecute or defend any suit, matter, or proceeding in any Court of justice, it shall be lawful for the Court or Judge before whom any such suit, matter, or proceeding has been heard or shall be depending, to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved; and upon such declaration being made, such attorney or solicitor shall have a charge upon and against and a right to payment out of the property, of whatsoever nature, tenure, or kind the same may be, which shall have been recovered or preserved through the instrumentality of any such attorney or solicitor, for the taxed costs, charges, and expenses of or in reference to such suit, matter, or proceeding; and it shall be lawful for such Court or Judge to make such order or orders for taxation of and for raising and payment of such costs, charges, and expenses out of the said property as to such Court or Judge shall appear just and proper; and all conveyances and acts done to defeat, or which shall operate to defeat, such charge or right shall, unless made to a *bona fide* purchaser for value without notice, be absolutely null and of no effect as against such charge or right. . . ."

(2) 6 De Gex, M. & G. 507.

(3) 44 Law J. Rep. C.P. 278; Law Rep. 10 C.P. 397.

(4) 49 Law J. Rep. C.P. 524.

(5) 47 Law J. Rep. Chanc. 457; Law Rep. 7 Ch. D. 495.

(6) 47 Law J. Rep. C.P. 426; Law Rep. 3 C.P. D. 252.

(7) 48 Law J. Rep. Chanc. 508; Law Rep. 11 Ch. D. 942.

(8) 1 Hurl. & N. 171; 26 Law J. Rep. Exch. 54.

(9) 28 Law J. Rep. Exch. 213.

right to the proceeds of the property which was so in the hands of the sheriff.

The statute provides in section 28 that "it shall be lawful for the Court or Judge before whom" the "suit, matter, or proceeding shall be depending" to declare the solicitor entitled to a charge upon the property recovered, "and all conveyances and acts done to defeat or which shall operate to defeat such charge or right shall, unless made to a *bona fide* purchaser for value without notice, be absolutely void and of no effect as against such charge or right." In the present case an act has been done—that is, the taking out the garnishee summons—not indeed "to defeat," but which will "operate to defeat" the charge or right of the solicitor. The case was depending before the Court—it was referred, but it was still depending—and an order declaring the solicitor to be entitled to a charge was made by a Judge at chambers. Now the statute gives the power to the "Court or Judge," and it is well recognised that that phrase always includes a Judge at chambers, unless there is some express enactment limiting the meaning of the phrase. This charging order was therefore made by the proper person, and yet it is urged that it is to be defeated by the garnishee summons. The statute, however, enacts that an act which will operate to defeat the charge is to be void unless made to a *bona fide* purchaser for value without notice. These words mean a *bona fide* purchaser in the usual business sense of those words, and they do not include a person who has taken out a garnishee summons—so that such a person is not within the exception contained in section 28 of 23 & 24 Vict. c. 127.

This solicitor has, therefore, a prior right or charge if we look to the words of the statute alone; but, further, it seems to me that on the facts this case cannot be distinguished from *Shippey* v. *Grey* (4), a case in which the statute is applied in the same way as that in which we are now applying it to these facts. That case, again, was founded on *Faithfull* v. *Ewen* (5), so that there are two decisions of this Court which are in point, and there are a number of decisions in every branch of the Court all to the same effect. I think, therefore, that this appeal must fail, and that the right view is that which Baron Pollock took when he said in the Queen's Bench Division, "the question is whether that charging order is to be dealt with as if it was a mere voluntary charge given by the party entitled in favour of another, or whether it is to be looked upon as intended to give the solicitor priority over all persons whatsoever claiming any interest in the fund, so long as the fund remains under the control of the Court. It seems to me the latter is the effect intended by the Act." I think that this appeal must be dismissed.

LINDLEY, L.J.—The party who took out the garnishee summons seeks to attach money in the hands of the sheriff which has been recovered in an action. I do not think that a person who takes out such a summons, or who obtains a garnishee order, or a judgment creditor, is a purchaser within 23 & 24 Vict. c. 127. s. 28, any more than he was under 27 Eliz. c. 4. Such a person cannot say that he has no notice that the solicitor may get a charging order, for he is aware that the money in question has been recovered by the exertions and instrumentality of the solicitor. I do not consider that the solicitor has a lien on the fund until he has obtained a charging order, but I should say that he has an inchoate right to get such an order, and that his right cannot be defeated by any person who has notice of the true state of the facts. In *Haymes* v. *Cooper* (10) Lord Romilly held that neither an assignment of the fund by the client nor a stop-order obtained by the assignee could affect the lien of the solicitor on the fund recovered by his exertions, and the cases in all the Courts have laid down the same principle.

Appeal dismissed.

Solicitors—Roberts & Barlow, agents for F. H. Adams, Upton Bishop, for respondent; White & Sons, agents for Garrold & Matthews, Hereford, for Davies.

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(10) 33 Beav. 431; 33 Law J. Rep. Chanc. 488.

[IN THE COURT OF APPEAL.]

BANKRUPTCY. 1884. July 18. } *Ex parte* BROAD; *in re* NECK.*

Bill of Exchange—Appropriation of Remittances to meet Acceptances—General Course of Business.

T., a Swedish merchant, was in the habit of drawing accommodation bills upon N., who carried on business in London, and of sending remittances from time to time to N. in order to enable him to meet the bills when due. The remittances were carried by N. to the credit of a general account between himself and T., in which T. was credited with interest upon the balance due to him. One of the accommodation bills for 450*l.* *was to fall due on the* 21*st of July*, 1883*; and on the* 13*th of July T. forwarded to N. a draft at sight for* 450*l.*, *with a letter, in which he said, referring to the draft, "which please encash to my credit." On the* 17*th of July N. cashed the draft, and on the* 20*th he stopped payment, and T. had to pay the bill which fell due on the* 21*st*:— Held, *that, having regard to the general course of dealing between the parties, there had been no specific appropriation of the draft to meet the particular acceptance falling due on the* 21*st of July, and that, as the draft was no longer in specie at the date of the failure of N., T. was not entitled to payment of the* 450*l.* *from the trustee in N.'s liquidation, but only to prove for that amount.*

In re The Gothenburg Commercial Company (29 W.R. 358) *followed.*

Jacob Thomsen, who carried on business under the style of Gottlieb Thomsen at Bergen in Sweden, had a credit with J. F. Neck, a banker of London, and was accustomed from time to time to draw bills upon Neck at three months, and, before they fell due, to remit funds to cover the acceptances.

On the 19th of April, 1883, Thomsen drew a bill on Neck, payable to the order of Bergen's private bank, which was accepted by him and fell due on the 21st of July, 1883.

On the 13th of July, 1883, he remitted to Neck a draft at sight for 450*l.* upon Westenholz Bros. of London, which was received by Neck on the 17th of July, 1883, and paid by him to his banking account with Barnett, Hoare & Co., and duly collected by them. The letter in which this draft was enclosed was as follows: "Enclosed I beg to remit 450*l.* at sight on Westenholz Bros., which please encash to my credit." In reply to which Neck wrote to Thomsen on the 18th of July, 1883, as follows: "We are in receipt of your favour of the 13th inst. handing a cheque for 450*l.* for 17th inst. on Westenholz Bros., which is noted to the credit of your account."

On the 20th of July Neck stopped payment.

On the 21st of July the bill drawn by Thomsen and accepted by Neck, payable to Bergen's bank, was presented for payment at Barnett, Hoare & Co.'s bank, and was refused payment and returned marked "orders not to pay." Thomsen was consequently compelled to retire the bill, and in the liquidation of Neck he applied to the trustee for payment of 450*l.*, on the ground that the draft remitted on the 13th of July had been specifically appropriated to meet the bill falling due on the 21st, and that he having paid the bill the debtor was consequently a trustee for him in respect of that amount. The trustee disallowed the claim; but on appeal to the Registrar his decision was reversed.

The trustee now appealed from the decision of the Registrar. Neck, in his evidence, deposed that he fully believed that the draft of the 13th of July was intended to meet the bill falling due on the 21st. His books, however, and the general correspondence between the parties, shewed that the ordinary course of business between them was that the amounts of the accommodation bills and of the remittances sent to meet them were placed to the debit and credit respectively of a general account between them; and in this account it appeared that the sum of 3*s.* 8*d.*, for interest on the 450*l.*, was credited to Thomsen in respect of the interval between the 17th and the 20th of July.

Sidney Woolf, for the trustee.—The Registrar thought he was bound by the

* *Coram* Baggallay, L.J., Cotton, L.J., and Lindley, L.J.

decision in *In re Hallett's Estate* (1); but the case is clearly governed by *In re The Gothenburg Commercial Company* (2), upon which authority it is clear that the draft being at the date of the stoppage no longer in specie, Thomsen is not entitled to follow the proceeds.

[BAGGALLAY, L.J., referred to *Johnson* v. *Robarts* (3).]

Linklater, for the respondent, referred to *In re Hallett's Estate* (1), *Ex parte Gomez; in re Yglesias* (4), and *Ex parte Cooke; in re Strachan* (5).

BAGGALLAY, L.J.—The question involved in this appeal is whether a particular draft for 450*l.*, which was remitted on the 13th of July to the debtor, was specifically appropriated to the taking up of a certain bill drawn by Thomsen, accepted by the debtor, and falling due upon the 21st of the same month, the debtor having stopped payment on the 20th.

Now the question whether there was specific appropriation depends, I think, partly upon the general course of dealing between the parties, and partly upon the circumstances connected with the particular remittance. It appears from the evidence that the ordinary course of dealing was this: that Neck from time to time was under liabilities for drafts which had been drawn by Thomsen and accepted by him, and the practice was for Thomsen to find the money for the acceptances on their becoming due, or to remit money for the purpose of enabling Neck to meet them. The course adopted by Neck appears to have been this: Possibly in some cases the bills were retained by him until they became due, but occasionally, at any rate, he cashed them at once and carried the amount of the cash, whether obtained by discount or otherwise, to the general credit of Thomsen. The particular remittance of the 13th of July was a bill payable at sight, and that bill was cashed by Neck on the 17th of July, and the amount was carried to the general credit of Thomsen. That appears to have been in accordance with the ordinary course of business between the parties; and if there was nothing else to take this particular transaction out of the ordinary course of business, it follows that the decision which the Registrar has arrived at in this case was wrong, and that Thomsen is not entitled to have the proceeds of the bill paid over to him. But it is suggested that there was a specific appropriation so far as regards this particular transaction; and reliance has been placed on the letter of the 13th of July which was sent to Neck together with the bill of that date; but from the terms of the letter it seems to me that the course adopted in that transaction was entirely in accordance with the usual course of dealing between the parties. No doubt the general ground or reason why the remittance was made was for the purpose of meeting bills becoming due (and there were other bills payable on the 21st); but the authority to cash and to carry that particular remittance to the credit of Thomsen is contained in this very letter. If this bill had not been cashed before the stoppage on the 20th, but had remained negotiable, then, upon the authority of *Ex parte Gomez* (4) and *In re The Gothenburg Commercial Company* (2), Thomsen would have been entitled to recover the proceeds of it. When once a remittance has been received in what I may call the ordinary course of business, and has been cashed and carried to the general credit of an account between the parties, the case of *In re The Gothenburg Commercial Company* (2) appears to me to apply distinctly. In that case it was strongly urged that there was a specific appropriation, and great reliance was placed upon the letters written before the stoppage—in particular upon one which was written only three days before referring to the remittance as being in respect of particular acceptances which were about to become due. In that case, however, it was held that as regards the remittances cashed before the stoppage and paid into the general account, there was no right on the part of those who remitted them to

(1) 49 Law J. Rep. Chanc. 415; Law Rep. 13 Ch. D. 696.
(2) 29 W.R. 358.
(3) 44 Law J. Rep. Chanc. 678; Law Rep. 10 Chanc. 505.
(4) Law Rep. 10 Chanc. 639.
(5) 46 Law J. Rep. Bankr. 52; Law Rep. 4 Ch. D. 123.

follow the proceeds, but that as regards those which were not cashed before the stoppage, the remitters were entitled to do so. I think, now that we have ascertained the nature of the course of dealing between the parties, the case clearly comes within the decision in *In re The Gothenburg Commercial Company* (2), and that this appeal must be allowed.

COTTON, L.J.—I also am of opinion that the appeal must be allowed. What we have to deal with is this, the proceeds of a particular remittance made by Thomson to the debtor which had been cashed before the stoppage. That is to say, we are not dealing with a bill which existed in specie at the time of the stoppage. If that had been the case it would have stood upon a very different footing, and, though it is not necessary to decide that question, I should probably have considered that Thomsen would have been entitled to say, "That is my bill. I have paid the acceptance, therefore hand the bill over to me." But what really took place was this. Some few days before the stoppage the debtor cashed the bill; and now Thomsen says, "I am entitled to follow the proceeds as trust money specifically appropriated to a purpose which has not been performed, and therefore I am in a position to ask that this money be handed over to me." In my opinion he is not so entitled. What we find is this, that although the remittances were made by Thomsen for the purpose of meeting the acceptances on his account, yet the debtor cashed or discounted the remittances that were made to him, and carried the proceeds to the general account of the customer, and credited the customer with interest on the sums which he obtained in respect of those remittances. Now, in *The Gothenburg Case* (2), Jessel, M.R., said, "The bills were sent, I think, originally for the purpose generally of providing funds to meet the acceptances, and for no other purpose, with this right of discounting or appropriating the money." If a man pays interest for money he must be entitled to the use of the money. When a man locks up money which is entrusted to him in a box, he does not charge himself with interest on it I think we must judge of the contract between the parties from the general course of dealing, and from the accounts which are rendered; and, looking at all the circumstances, in my opinion, although so long as a particular remittance remained in specie unappropriated the customer might have said, "Hand it over to me," yet, looking at the accounts rendered from time to time, the inference is that Neck was to be at liberty to put himself in funds by cashing the remittances, and when he had done so to treat himself, not as a trustee of the proceeds for the customer, but only as a debtor to the customer for the sums which he had thus received. In my opinion, interest being from time to time carried to the credit of the customer in the account, Neck was entitled to put the proceeds into his own pocket, not keeping them separate from his general account.

In my opinion therefore, as regards the proceeds of bills cashed before the stoppage, the customer must come in and prove as a creditor. I cannot see any distinction at all between this case and the previous decision in *The Gothenburg Case* (1).

LINDLEY, L.J.—I am of the same opinion. If we look at the course of dealing between these parties and the terms of the letter of the 13th of July which was sent with the bill for 450*l.* at sight, and also look at what was done with reference to the interest on the balance due in the account between the parties, I think the inference is inevitable that the position of Neck, as regards the money received by him, in respect of the bill at sight, was not that of a trustee, but of a debtor. I think that is the true and only inference which can be drawn. I am quite unable to distinguish this case from *In re The Gothenburg Commercial Company* (2).

Solicitors—H. Montagu, for the trustee; Young, Jones & Co., for respondent.

[IN THE QUEEN'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

1884. Nov. 21. Dec. 10.

EMENY *v.* SANDES.*

Practice—Costs—Action remitted to the County Court for Trial—Rules of Court, 1883, *Order LXV. rules* 1 *and* 4.

Order LXV. rule 4 *of the Rules of the Supreme Court*, 1883, *provides that where an action is ordered to be tried in a County Court under the provisions of* 19 *&* 20 *Vict. c.* 108. *s.* 26, "*the costs of the action shall, subject to the provisions of the principal Act and these rules, follow the event, unless by the Registrar's certificate of the result of the trial it shall appear that the Judge before whom the action was tried was of opinion that the question of costs ought to be referred to a Judge of the High Court, in which case no costs shall be recovered unless ordered by the Court or a Judge*":—Held (*reversing the judgment of the Queen's Bench Division*), *that the High Court has jurisdiction over the costs of an action remitted for trial to a County Court and tried before the Judge, even though the Registrar's certificate does not contain any certificate under Order LXV. rule* 4 *that the Judge was of opinion that the question of costs ought to be referred to the High Court, and although the Judge has made no order as to costs.*

Application by the defendant for an order that the plaintiff should pay to the defendant his costs of the action or that each party should pay his own costs.

The action was brought to recover 52*l.* 8*s.* 6*d.*, balance alleged to be due to the plaintiff for work done and materials provided by the plaintiff for the defendant under a building contract. The defendant paid into Court 37*l.* 2*s.* 6*d.*, leaving 15*l.* 6*s.*, the amount in dispute.

The action was remitted to the County Court for trial under the provisions of section 26 of the County Courts Act, 1856. At the trial the County Court Judge, who tried the case without a jury, disallowed the items claimed by the plaintiff for his own time, and reduced the carting of bricks from 10*s.* per hundred as claimed to 4*s.* 6*d.* per hundred. The County Court Judge did not himself give judgment for any sum, but directed the Registrar to go through the plaintiff's particulars and make the necessary calculation, and that his judgment would be for the amount which the Registrar thus ascertained. The Registrar by his certificate found the plaintiff entitled to 2*s.* 5*d.* beyond the amount which the defendant had paid into Court, and adjudged "that the plaintiff recover against the defendant 2*s.* 5*d.*, being the balance of the said sum of 37*l.* 4*s.* 11*d.* after giving credit for the sums of 32*l.* and 5*l.* 2*s.* 6*d.*, making together 37*l.* 2*s.* 6*d.* paid into Court by the defendant, and costs to be taxed." No order as to costs was made by the County Court Judge, nor did the Registrar certify under Order LXV. rule 4 that the Judge was of opinion that the question of costs ought to be referred to a Judge of the High Court. Nor, when the result of the Registrar's calculation was ascertained, was there any opportunity of applying to the County Court Judge for costs, as he had then risen for the day.

Morton Smith, for the defendant, in support of the application.—A case remitted to the County Court for trial is still a proceeding in the High Court, and by Order LXV. rule 1 the costs are in the discretion of the Court. There was no opportunity to ask the County Court Judge for costs, and no subsequent application could be made to him under rule 4. That rule enacts that the costs shall follow the event "subject to the provisions of the principal Act and these rules"—in other words, subject to the provisions of rule 1 by which the costs are to be in the discretion of the Court or a Judge. Under rule 1 the Divisional Court has an original jurisdiction to make an order to deprive a successful party of the costs—*Myers* v. *Defries* (1); and there is power to order a plaintiff who recovers a nominal sum to pay the defendant's costs—*Harris* v. *Petherick* (2).

* *Coram* Brett, M.R., Cotton, L.J., and Lindley, L.J.

(1) 49 Law J. Rep. Q.B. 266; Law Rep. 5 Ex. D. 180.

(2) 48 Law J. Rep. Q.B. 521; Law Rep. 4 Q.B. D. 611.

Emeny v. *Sandes, App.*

Poyser, for the plaintiff.—The provisions of Order LXV. rule 4 are express, that in the case of actions remitted for trial to the County Court the costs shall follow the event, unless it appears from the Registrar's certificate that the Judge before whom the action was tried was of opinion that the question of costs ought to be referred to the High Court. The expression "subject to the provisions of the principal Act and rules" means, subject to such part of the rules as is not inconsistent with rule 4 itself, such as the exceptions in the case of an executor, administrator, trustee, or mortgagee in rule 1. [He was then stopped by the Court.]

STEPHEN, J.—I am of opinion that this application must be dismissed. I was at first impressed by the argument that rule 1 of Order LXV. overrode rule 4 of the same Order. But if this were so there would have to be an application for costs to the Divisional Court in every case remitted for trial to the County Court. The correct interpretation of the words in rule 4, "subject to the provisions of the principal Act and these rules," appears to me to be that the costs in action when ordered to be tried in the County Court under the provisions of 19 & 20 Vict. c. 108. s. 26 are to be subject to the exceptions which are not inconsistent with the provisions of rule 4—for instance, the exceptions in rule 1, as in the case of an executor, administrator, trustee, or mortgagee. The effect of this view is that the Divisional Court cannot make any order as to the costs unless set in motion by the Registrar's certificate in accordance with rule 4. Whether the County Court Judge can be applied to now for an order for costs I express no opinion. In the present case we have no jurisdiction over the costs, and this application must be dismissed.

MATHEW, J.—I am of the same opinion. I have no doubt that the County Court Judge cannot give any subsequent direction as to costs, if he failed to do so at the time of giving judgment. The argument of the defendant's counsel was that when no order as to costs was given under rule 4, the Divisional Court had power to give costs in the exercise of its general jurisdiction over costs given by rule 1. I cannot suppose that this was the intention with which rule 4 was framed. Such a construction would let in again the inconveniences which arose from the decision in *Farmer* v. *May* (3), and which this rule was obviously intended to prevent.

The defendant appealed.

Morton Smith, for the defendant, cited *Farmer* v. *May* (3) and Order LXV. rules 1 and 4 (4).

Malden, for the plaintiff.

BRETT, M.R.—Two points arise on this appeal, one upon the practice in the County Court, and the other upon the construction of Order LXV. rule 4. With regard to the judgment in the County Court it should be borne in mind that it is, and must be, the judgment of the Judge and not the judgment of the Registrar. In the present case, the Judge, having laid down the principle, referred the details to the Registrar to find out in whose favour the result ought to be, and on its being so worked out it appeared that the defendant had paid into Court 2*s.* 5*d.* too little, and a certificate

(3) 50 Law J. Rep. Q.B. 295; 44 L. T. Rep. 148.

(4) Order LXV. rule 1: "Subject to the provision of the Act and these rules, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or Judge: provided that nothing herein contained shall deprive an executor, administrator, trustee, or mortgagee, who has not unreasonably instituted or carried on or resisted any proceedings, of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the Chancery Division: provided also, that where any action, cause, or matter, or issue is tried with a jury, the costs shall follow the event, unless the Judge by whom such action, cause, matter, or issue is tried, or the Court, shall for good cause otherwise order."

Rule 4: "Where an action is ordered to be tried in a County Court under the provisions of 19 & 20 Vict. c. 108. s. 26, the costs of the action shall, subject to the provisions of the principal Act and these rules, follow the event, unless by the Registrar's certificate of the result of the trial it shall appear that the Judge before whom the action was tried was of opinion that the question of costs ought to be referred to a Judge of the High Court, in which case no costs shall be recovered unless ordered by the Court or a Judge."

was given that the plaintiff should recover that sum against the defendant. It is urged that in these circumstances the Judge of the County Court had lost all power over the costs; but I am unable to adopt that view. I think that the Registrar should have drawn the Judge's attention to the result, and should have asked him for a direction as to the costs. Had this been done, then the Judge might have allowed the costs to follow the event; or he might have given a certificate, in which case there might have been an application at chambers. As it is, however, no such request was made, and the certificate has come before the High Court without any report made by or any opinion expressed by the Judge; and this being the case it is said that the Court has no jurisdiction and cannot interfere in the matter. If, however, rule 4 of Order LXV. incorporates the whole of rule 1 of the same order, then, as it seems to me, this Court has power. Rule 4 says that, "subject to the provisions of the principal Act and these rules," costs shall follow the event unless certain things are done. That means that the whole of the rules, and not part only, is incorporated: for I think that all and every part of the rules, and the whole of rule 1, is incorporated into rule 4.

If the trial of the case had been held in the superior Court, the Judge might or might not have dealt with the costs; but in any case the rule gives the Court or a Judge power, so that there can be an original motion to the Court, not by way of appeal, but by an original motion; and therefore there can be an original motion to the High Court, even though the County Court Judge has not interfered in the matter. It is said that this view renders rule 4 of no effect; but that is not so, for the provisions of rule 4 prevent the necessity of an application to the Divisional Court except in certain circumstances; but if certain circumstances exist, then the Divisional Court has jurisdiction, and this being so we ought upon this appeal to do that which we think that Court ought to have done. In this case the defendant did not take the steps which he ought to have taken. If he had obtained a certificate in proper form, then the application would have been made at chambers and not to the Divisional Court; but as this was not done, it was, I think, open to the Divisional Court to entertain the matter. There will be no costs of the motion to the Divisional Court, but the defendant will have the costs of this appeal. As to the action, the plaintiff must have the costs up to the time of payment into Court; and with regard to the trial, the defendant will neither receive nor pay any costs of the trial in the County Court.

COTTON, L.J.—If rule 4 were a proviso to rule 1 of Order LXV., then it would have a limiting or restrictive effect; but it is not a proviso to another rule, it is a substantive rule, and introduces all the provisions of rule 1 which are applicable, so that the High Court had in this case jurisdiction to deal with the matter even though the County Court Judge had not appended to the certificate any expression as to costs.

LINDLEY, L.J.—The old practice as it existed prior to these rules helps us to understand the effect of Order LXV. rule 4. Under that practice the question of costs had to be determined by the High Court, for by the provision at the end of 19 & 20 Vict. c. 108. s. 26 no costs could be got without an order at chambers. To dispense with that step the rules of Court contain the provision which is now before us, and the words inserted in rule 4 were put in for the purpose of inviting the County Court Judge to aid the High Court in settling what is the proper view to take on the question of the costs in each case; but the rule has not given the County Court Judge the duty of disposing of the costs. That still remains in the High Court. Rule 4 incorporates the whole of rule 1, and the High Court has jurisdiction to deal with the costs: so that the Divisional Court had jurisdiction, and we ought to deal with this case in the way the Master of the Rolls has stated.

Appeal allowed

Solicitors—Clark & Calkin, agents for J. C. Shafto, Framlingham, for plaintiff; W. M. Tayler & Son, agents for R. R. Hill, Ipswich, for defendant.

[IN THE COURT OF APPEAL.]

1884. Dec. 13. } LIMPUS AND ANOTHER v. ARNOLD.*

Will, Construction of—Advances—Promissory Note with Interest from Child—Bequest to Children subject to Wife's Interest in Income and Advances brought into Account—Interest due to Wife.

A testator, who had lent money to his son and taken a promissory note with interest, made his will, whereby he left all the residue of his property, subject to the income being received by his wife during widowhood, to his children, with a proviso that advances to children during his lifetime, together with interest, should be taken into account in their shares:—Held (*dissentiente* COTTON, L.J.), *that, in the absence of evidence of a contrary intention, the interest on the note was not released and the executors of the widow were entitled to it as against the son.*

Appeal by the defendant from the judgment of Stephen, J., and Mathew, J. (reported 53 Law J. Rep. Q.B. 415), upon a Special Case raising the question whether, on the true construction of the will of Robert Arnold, dated the 20th of December, 1873, Jane Arnold, his widow, was entitled during her widowhood to receive, as part of the annual income given by the will, interest on the sum of 2,000*l.*, part of a sum of 2,500*l.* which on the 1st of January, 1862, had been advanced by the testator to his son, the defendant, on the security of a promissory note for that amount, bearing five per cent. interest, and which was reduced by payments as shewn by a memorandum-book kept by the testator. The plaintiffs were the executors of Jane Arnold, and claimed 293*l.* interest from the 2nd of December, 1879, the date of the death of the testator, to the death of Jane Arnold.

By his will the testator devised and bequeathed all the residue of the personal estate which might belong to him at the time of his death to three trustees, of whom the defendant was one, with a direction that his trustees should sell and invest his real property, and should "convert his personal trust property not consisting of moneys invested in stocks, funds, or securities yielding income other than personal securities," and should invest the produce, and permit his wife, she continuing a widow, to receive from his death "the net annual income actually produced by his trust property, however constituted or invested, and, subject to the preceding directions, to hold it for the absolute use of his child if only one, or all his children equally if more than one." The will contained the following clause, "Provided always and I declare that any advances made by me to any child or the husband of any child in my lifetime, together with interest on such advances from the time of making thereof as charged against such child or her husband in my private memorandum-book in my own handwriting, shall, according to the amount thereof, be taken in full or in part satisfaction of his or her share in my trust property unless I shall otherwise declare by writing under my hand."

H. A. Giffard, Q.C. (*Warr* with him).—The 2,000*l.* was an advance, not a loan—*Meinetzerhagen* v. *Walters* (1) and *Stewart v. Stewart* (2). The executors could not have sued on the note—*Gilbert* v. *Wetherall* (3). He also cited *Anstie* v. *Powell* (4) and *Rees* v. *George* (5).

Channell.—The question is as to the time at which the testator intended to release the debt from his son. He did not intend to release it until the period of distribution.

Warr in reply.

BRETT, M.R.—I look at this will in order that I may see whether an intention on the part of the testator is to be gathered from it, and if I see a clear intention I pay no attention to what has been decided in regard to other wills. The testator had lent money to his son which was secured

* *Coram* Brett, M.R., Cotton, L.J., and Lindley, L.J.

(1) 41 Law J. Rep. Chanc. 801; Law Rep. 7 Ch. App. 670.
(2) 49 Law J. Rep. Chanc. 763; Law Rep. 15 Ch. D. 539.
(3) 2 Sim. & S. 254.
(4) 1 De Gex, J. & S. 99.
(5) 50 Law J. Rep. Chanc. 328; Law Rep 17 Ch. D. 707.

by a promissory note. He made his will, which I shall read as if I were standing at his elbow. He meant to leave all his property to his widow for life, and afterwards to his children. The real property was to be sold, but with regard to the personal property he says: "I direct that my trustees shall convert my personal trust property not consisting of moneys invested in stocks, funds, or securities yielding income other than personal securities." When the testator used the words "personal securities" he was thinking of this promissory note, which people are apt to look upon as a security, although it is little more than evidence of the debt. What he meant was that his trustees must not sue his son on the note. Then the will directs the property to be divided among his children. When? At his wife's death, and not until then. There are said to be rules of construction laid down in decided cases applicable to this matter; but not one of the cases is really in point. All the cases are cases in which the advances were made after the will was made. There is not one in which there is a clear intention in favour of the wife expressed. There is no authority which can prevail against the plain view of the testator's meaning. As to the proviso, it is applicable only on the wife's death.

COTTON, L.J.—I am sorry that I am unable to agree. I do not concur in the estimate of the Master of the Rolls of the value of decided cases upon questions of construction. The meaning of a testator in one case is no help to the meaning of a testator in another, but the cases shew what the result of the true construction of the words is. It is conceded in this case that the debt was released from the period of distribution. I do not agree with the Master of the Rolls as to direction for conversion. The testator, in my opinion, does not direct his personal property "other than personal securities" to be converted. This construction would take the words out of the order in which they occur. The exception is on the words immediately preceding—namely, "not consisting of moneys invested in stocks, funds, or securities yielding income." It is not an exception on the personal property which is to be converted. The "personal securities" are an exception from the personal property which is to be saved from conversion, and we have no evidence what those personal securities were. The testator may have had a number of personal securities of which we know nothing, or those who drew his will may have contemplated the possibility of his having personal securities at the time of his death which in fact he did not have. It is an unsound mode of construing a testator's will to assume that the facts in existence at his death were the only facts in existence or in contemplation at the time of his making his will. In my opinion this sum of money was an advancement, and there is nothing in the will to shew that the testator intended to draw a distinction between the release of advancements at the period of distribution and their release altogether.

LINDLEY, L.J.—I concur in the judgment of the Master of the Rolls. The debt in question was due at the time of the death of the testator, subject to anything in the will releasing it. The general direction to convert is obscure, and I think it would be unsafe to take it as a basis of argument; but I agree with the Master of the Rolls that the direction must be read as a direction to get in all the personal property except personal securities. But where is there in the will any direction that the interest on the advance is to stop? It is said that the release is to come into operation at the time when the man dies; but I think, from the terms of the will, it comes into operation when the fund is distributed. I do not think we can say that the interest has stopped.

Appeal dismissed.

Solicitors—E. & F. Bannister, for plaintiffs; Park, Nelson, Morgan & Gemmell, agents for Footner & Son, Romsey, for defendants.

[IN THE COURT OF APPEAL.]

BANKRUPTCY. 1884. Dec. 12. } *In re* ANGELL; *ex parte* SHOOLBRED.*

Bankruptcy — Costs — Solicitor and Client—Application in reference to Orders already made—Bankruptcy Rules, 1883, *rule* 98.

The jurisdiction under rule 98 *of the Bankruptcy Rules*, 1883, *allowing the Court "in awarding costs to direct that the costs of any matter or application shall be taxed and paid as between party and party or as between solicitor and client," must be exercised once for all at the time of making the order, and an application for costs as between solicitor and client by a creditor in proceedings in respect of which he had by previous orders obtained costs as between party and party based on the ground of meritorious services as shewn by the result of the bankruptcy cannot be entertained.*

Appeal of Shoolbred, the petitioning creditor, from the order of Mr. Registrar Murray refusing to give to Shoolbred costs as between solicitor and client incurred on three occasions. The creditor had obtained costs as between party and party of opposing the registration of a composition of 5*s.* in the pound, of attending the hearing of an abortive petition under the old practice, and on a motion that the bankrupt should be discharged on paying 20*s.* in the pound. He now asked that his costs on those occasions should be given him as between solicitor and client under rule 98.

Rule 98 provides that "the Court in awarding costs may direct that the costs of any matter or application shall be taxed and paid as between party and party or as between solicitor and client, or that full costs, charges, and expenses shall be allowed, or the Court may fix a sum to be paid in lieu of taxed costs."

H. Reed, for Shoolbred.—But for the exertions of this particular creditor the creditors would have had to be contented with 5*s.* in the pound instead of 20*s.* It was intended that meritorious services of this kind should be rewarded by costs as between solicitor and client. The application could not have been made at the time of the orders, because the result of the creditor's exertions was not known.

J. Macdonell, for the trustee and official receiver, was not called on.

BRETT, M.R.—The rule means that when the Court makes an order as to costs it has power to say that costs shall be paid as between solicitor and client. Orders have been made as to costs in this case, but there has been no order giving costs as between solicitor and client. The appeal, if any, ought to have been against those orders as soon as they were made. I do not say that an appeal will not lie against such an order, but it would be as difficult an appeal as can well be. If there is an appeal at all it must be against those orders. It is, however, agreed that those orders were right when made, and it is not open to the Court to make new substantive orders. It has no jurisdiction to do so, and it is too late to appeal against those orders.

COTTON, L.J.—I think the Registrar was right. This is not an appeal against the orders, and costs between solicitor and client can only be given in awarding costs. This must be done when the Court makes the order. If not done then, the Court has no power to rip up the whole matter and consider whether the conduct of the creditor has been in the result meritorious. The case of a litigant obtaining solicitor and client costs is a very exceptional case.

LINDLEY, L.J.—I am of the same opinion. Any other conclusion would open a door to great inconveniences. The rule applies only to the occasion of awarding costs, and the costs have been awarded without appeal.

Appeal dismissed.

Solicitors—Hindson, Miller & Vernon, for creditor; W. W. Aldridge, for trustee.

* *Coram* Brett, M.R., Cotton, L.J., and Lindley, L.J.

BANKRUPTCY. 1884. Nov. 11, 24. } *In re* WHITEHEAD; *ex parte* ROUTH.

Husband and Wife—Statute of Frauds—Agreement in Consideration of Marriage—Part Performance.

A parol agreement before marriage that property, consisting of a sum of money standing to the credit of a wife in her maiden name at her banker's, shall belong to the wife for her separate use, not followed by any transfer of the property to trustees, does not constitute a good ante-nuptial settlement.

The mere fact that from the date of the marriage to the happening of his bankruptcy, three years afterwards, the husband allows the property so to remain to the credit of his wife, and the interest to be paid to her, does not amount to a part performance so as to take the case out of the operation of the Statute of Frauds.

Appeal from the Leeds County Court.

The facts sufficiently appear from the judgment.

Cooper Willis, Q.C., and *Sturges*, for the appellant, the trustee.—The Married Women's Property Act, 1882, does not apply.

They cited *White & Tudor's Leading Cases* (1), *Simmons* v. *Simmons* (2), and *Mews* v. *Mews* (3).

Warmington, Q.C., and *Finlay Knight*, for Mrs. Whitehead.—It is competent to the husband to agree to give up his *jus mariti*, and he has done so here, and the agreement has been followed by performance—namely, by the husband's doing nothing.

They referred to *Parker* v. *Lechmere* (4) and *Whittaker* v. *Whittaker* (5).

Cooper Willis, Q.C., replied.

Cur. adv. vult.

CAVE, J. (on Nov. 24).—In this case the trustee appealed from the decision of the Judge of the County Court refusing to declare that he was entitled to a sum of 1,350*l.*

In September, 1879, the bankrupt married Harriet Milner, who was then entitled to property both real and personal. The real property was duly settled upon her; but the personal property, which consisted of a sum of 1,400*l.* standing to her credit at a bank, was not included in the settlement.

The County Court Judge has found as a fact, and I agree with him, that there was a parol agreement by the husband with the wife that she should have this sum of money for her separate use. Nothing, however, was done to carry out this agreement. The money was not transferred to trustees for the wife, but remained in the bank to the credit of the wife in her maiden name, and after the marriage she always received the interest from the bankers. Subsequently the parties separated; and in March, 1882, the husband made enquiry at the bank after this money with the intention of claiming it; but on the 27th of March the wife drew the balance, amounting to about 1,350*l.*, out of the bank. On the 29th of November, 1883, the husband filed a petition for liquidation.

Upon the argument before me it was contended on behalf of the trustee that there was no parol agreement by the husband. Upon this point the learned Judge has found in favour of the wife, and, as I have stated, I agree with him so far.

It was next contended that that agreement was void according to the Statute of Frauds, and that consequently the trustee was entitled to the money.

For the wife it was urged that a parol agreement followed by part performance is binding, and that here there was performance of everything the husband had to do, which was to leave the money alone.

The case of *Simmons* v. *Simmons* (2) was relied on by both sides. In that case the husband's bill was dismissed on the ground that he had not strictly entitled himself to any relief by the facts he had alleged and proved. But the Vice-Chancellor (6), while suggesting that a parol agreement followed by the parties volun-

(1) 5th ed. vol. i. p. 535.
(2) 6 Hare, 352.
(3) 15 Beav. 529.
(4) Law Rep. 12 Ch. D. 256.
(5) 51 Law J. Rep. Chanc. 737; Law Rep. 21 Ch. D. 657.

(6) Sir James Wigram.

tarily placing the property under the dominion of a trustee was a very different case from that of an agreement which had never been acted upon, gave no definite opinion on the law of the case.

With much respect, I subscribe to the opinion of the then Master of the Rolls (7), who, in *Cooper* v. *Wormald* (8), said that "if a lady and gentleman transfer the property before the marriage to trustees upon the trusts agreed upon by them by parol merely, and the trustees accept the money accordingly, whether there be or be not any subsequent declaration of trust in writing, that transaction is good against all the world, and no creditor can set it aside." In my judgment, to hold that under the law as it existed in 1879 a mere parol agreement not followed by any transfer of the property to trustees before the marriage could, whatever might be done after the marriage, constitute a good ante-nuptial settlement, would be to repeal, in effect, the Statute of Frauds so far as it relates to promises in consideration of marriage.

It has, however, been suggested that the wife is entitled to a settlement of this property, or at all events of some portion of it; and in my judgment there is some ground for this contention. As, however, I have only heard one side on this question, and that but partially, the case must be restored to the paper, if the trustees desire it, in order that this point may be argued.

[Declare that the trustee is entitled subject to wife's equity to a settlement, if any. Costs reserved.

To stand over *sine die*. Liberty to wife to serve notice of motion for settlement, and to apply generally.]

Solicitors—Pitman & Sons, agents for Malcolm & Hainsworth, Leeds, for appellant; Henry A. Maude, agent for W. Emsley, Leeds, for respondent.

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(7) Sir John Romilly.
(8) 27 Beav. 266, at p. 270.

[IN THE COURT OF APPEAL.]

BANKRUPTCY. 1884. June 20. } *Ex parte* REVELL; *in re* TOLLEMACHE (No. 1).*

Bankruptcy—Proof—Judgment Debt—Consideration for—Power of Court to enquire into.

Where a proof in bankruptcy is founded on a judgment debt, prima facie the judgment must be considered as binding; but if a proper case is shewn, the Court will direct an enquiry into the consideration for the judgment debt.

The admission of a debt by a bankrupt in his statement of affairs is not such an admission against his own interest as to constitute, as against his creditors, evidence of the existence of the debt.

This was an appeal against an admission by Mr. Registrar Pepys of a proof for 2,300*l.* 17*s.* 6*d.* in the bankruptcy of Lord Huntingtower.

The bankruptcy took place in September, 1842, but it was not until 1878, on the death of Earl Dysart, the father of the bankrupt, that any assets were available for distribution amongst the creditors. The debtor had died in 1872. The proof was tendered by J. N. Edwards, as executor of his father H. Edwards, who died in 1874. The debtor had in 1841 given to H. Edwards a promissory note for 2,250*l.* in respect of his indebtedness to him. Upon this note, one Phillips had lent to H. Edwards the sum of 200*l.*, the object of the advance being to enable Phillips to sue the debtor in his own name, which Phillips accordingly did, and on the 26th of January, 1842, obtained judgment for 2,262*l.* 10*s.* for debt and interest, and 38*l.* 7*s.* 6*d.* for costs, of which judgment, and of the proceeds thereof, Phillips was a trustee for H. Edwards. The promissory note was lost. The bankrupt, in his statement of affairs made at the commencement of the bankruptcy proceedings, had inserted the name of H. Edwards as a creditor for 1,500*l.*

The Registrar admitted the proof for 2,300*l.* 17*s.* 6*d.*, against which the official

* *Coram* Baggallay, L.J., Cotton, L.J., and Lindley, L.J.

assignee in the bankruptcy and the creditors' assignees now appealed.

Winslow, Q.C., and *Yate Lee*, for the appellants.—There is no evidence in support of the debt except the judgment, and the Court can go behind that and enquire what was the consideration for the debt—*Ex parte Bryant* (1), *Ex parte Maberly* (2), *Ex parte Marston* (3), and *Ex parte Kibble* (4).

[BAGGALLAY, L.J., referred to *Ex parte Banner* (5).]

Bigham, Q.C., and *H. Reed*, for the respondent.—Where a judgment is sought to be impeached, the onus is upon the person seeking to impeach it. *Prima facie* a judgment is obtained properly for a debt which is due. In *Ex parte Maberley* (2) an affidavit by the creditor that he had given "full value" for the bill of exchange on which he sought to prove was held to import a sufficient consideration. Of course the Court can enquire into the judgment, but the onus of proof is still upon the impeaching party—*Ex parte Marston* (3) and *Ex parte Mudie* (6).

In *Ex parte Banner* (5) there was fraud. A judgment imports consideration until it is impeached—*Ex parte Ritso* (7). At all events proof ought to be admitted for the sum declared to be due by the bankrupt in his statement of affairs. As he is dead that is sufficient evidence against him—*Price* v. *The Earl of Torrington* (8).

BAGGALLAY, L.J., after stating the facts, continued:—The first observation which naturally occurs to one is, why was not this proof tendered forty-two years ago? It is said that the value of the bankrupt's assets was then so small, and the amount of his debts so large, that it was not worth while to incur the expense of establishing the claim to prove at that time; it would have been throwing good money after bad. The creditor chose to act upon that view of the case, and now, forty-two years afterwards, his legal personal representative comes forward to make this claim, which is founded on a judgment obtained in 1842, and is only supported by evidence as to the information and belief of persons who could have known nothing of the original transaction. Having regard to the authorities, I think a case has been shewn for enquiry into the consideration for the judgment debt. It is unnecessary to deal with the proposition of Mr. Winslow that in every case the Court of Bankruptcy is entitled to enquire into the consideration for a judgment debt. The rule is clearly stated by Lord Justice James in *Ex parte Kibble* (4) thus: "It is the settled rule of the Court of Bankruptcy, on which we have always acted, that the Court of Bankruptcy can enquire into the consideration for a judgment debt. There are obviously strong reasons for this, because the object of the bankruptcy laws is to procure the distribution of the debtor's goods among his just creditors. If a judgment were conclusive, a man might allow any number of judgments to be obtained by default against him by his friends or relatives without any debt being due on them at all; it is therefore necessary that the consideration for the judgment should be liable to investigation." As at present advised, I do not wish to lay it down as a rule that the Court should enquire into the consideration for a judgment debt when nothing is shewn to justify the enquiry. I am disposed to think that *prima facie* a judgment ought to be considered as binding. But, if a proper case is made, I think the Court ought to direct an enquiry into the consideration for a judgment debt. The judgment of Lord Justice James in *Ex parte Kibble* (4) appears to me consistent with all the previous cases. I think if this proof had been tendered at the commencement of the bankruptcy proceedings, it would have been within the power of the commissioner, and it would have been his duty, to direct an enquiry into the consideration for the judgment

(1) 1 Ves. & B. 211.
(2) 2 Mont. & Ayr. 23; 4 Law J. Rep. Bankr. 3.
(3) 3 Mont. & Ayr. 155, 444; 2 Deac. 245; 3 ibid. 79.
(4) 44 Law J. Rep. Bankr. 63; Law Rep. 10 Chanc. 373.
(5) Law Rep. 17 Ch. D. 480.
(6) 3 Mont. D. & D. 66; 12 Law J. Rep. Bankr. 25.
(7) 52 Law J. Rep. Chanc. 535; Law Rep. 22 Ch. D. 529.
(8) 1 Sm. L.C. (8th ed.) 344; 1 Salk (6th ed.), 285.

Ex parte Revell; in re Tollemache (App.), Bankr. (No. 1.)

debt. But no such investigation took place because the creditor did not then think it worth his while to prove. The time has gone by, and I do not think any further evidence could now be obtained. In my opinion, upon the evidence as it stands, the proof ought not to be admitted.

COTTON, L.J.—I am of the same opinion. The proof is founded simply on the judgment, for there is no evidence of any indebtedness by the bankrupt independently of the judgment. What is the law on the point? In bankruptcy a judgment certainly stands in a different position from that in which it previously stood as against the debtor himself, because the rights of the other creditors of the bankrupt have supervened. When a person is *sui juris*, a judgment against him is very strong *prima facie* evidence against him of the existence of a debt; if he disputes it, he must satisfy the Court that there is some reason which requires that the judgment should be set aside. It has been contended that in bankruptcy a judgment ought to be entirely disregarded; but it is unnecessary to decide that point now. I will deal with the case on the footing that the judgment cannot be disregarded, but that there may be other facts which entitle the Court to go behind it. What are the facts here? The judgment was obtained by Phillips in 1842, but he made no attempt to prove in the bankruptcy. The present claimant says that his father, having obtained this promissory note for 2,250*l.* from the bankrupt, handed it over to Phillips, who paid 200*l.* for it, and that he held the note as a mere trustee for Edwards. It is impossible to shut one's eyes to this, that the payment of the 200*l.* was not a real transaction, but that it was made to enable Phillips to say that he was a holder of the note for value. It shews that, for some reason or other, Edwards was unwilling himself to sue the bankrupt upon the note. In my opinion, if the proof had been put forward at the commencement of the bankruptcy, it would have been the duty of the Court to make enquiry into the consideration for the judgment debt, and we ought not to deal with the matter on any other footing now. We ought not to put Edwards or his estate in any better position because he has allowed the time to go by till those persons who could have told us the real facts of the case are dead.

It is said, however, that the proof ought to be admitted for the 1,500*l.* which is mentioned in the bankrupt's statement of affairs. I am of opinion that that statement, being made after the bankruptcy, is not such an admission against the interest of the bankrupt as is evidence against his creditors.

LINDLEY, L.J.—I am of the same opinion. It is rather a startling thing to be asked to admit a proof of a debt forty-two years after the commencement of the bankruptcy, no one having heard anything of it till now. It is true that the Statute of Limitations has not run. But if we carry ourselves back to the year 1842, could the Court then have allowed Edwards, the father, to make this proof without any investigation into his claim? I think not. Looking at the circumstances, which throw a great deal of suspicion on the debt, it would not have been just to the other creditors to allow the proof without any investigation then, and I think it would be much less just now.

[Leave to appeal to the House of Lords was refused.]

Solicitors—Still & Son, for official assignee; M. T. Hodding, for appellant.

[IN THE COURT OF APPEAL.]

1884. Dec. 10, 11. THE QUEEN (*on the prosecution of* THE GUARDIANS OF MERTHYR TYDVIL UNION) *v.* THE GUARDIANS OF STEPNEY UNION.

Poor—Settlement—Residence—39 & 40 *Vict. c.* 61. *s.* 34.

[For the report of the above case, see 54 Law J. Rep. M.C. 12.]

[IN THE COURT OF APPEAL.]

BANKRUPTCY. 1884. June 27. } *Ex parte* REVELL; *in re* TOLLEMACHE (No. 2).*

Bankruptcy—Proof—Judgment Debt—Prior Act of Bankruptcy—Notice—Onus of Proof—Bankruptcy Act, 1849 (12 & 13 *Vict. c.* 106), *s.* 165.

Where a creditor seeks to prove in a bankruptcy, under an enabling section of an Act of Parliament, notwithstanding the fact that a prior act of bankruptcy, upon which the adjudication was founded, has been committed by the bankrupt, the onus is upon the creditor to shew that he had no notice of such prior act of bankruptcy.

Ex parte Schulte; *in re* Matanlié (Law Rep. 9 Chanc. 409) *followed.*

This was an appeal against the admission of a proof in the bankruptcy of Lord Huntingtower.

The proof was tendered by H. B. Garling as residuary legatee under the will of Mrs. Madeley, who died in 1856, she being residuary legatee under the will of R. S. Bassil, who died in 1849, after having obtained a judgment against the bankrupt in the same year. The only evidence of the debt to Bassil consisted of the judgment; but there was no evidence that, prior to the obtaining of the judgment, Bassil had not had notice of an act of bankruptcy committed by the debtor in 1842, on which act of bankruptcy the adjudication was founded. The Registrar admitted the proof, and the official assignee and the creditors' assignees appealed.

Winslow, Q.C., and *Yate Lee*, for the appellants.—Where a person claims to prove for a debt arising after the commission of an act of bankruptcy by the debtor the onus is upon such person to shew that he had no notice of such act of bankruptcy —*Ex parte Schulte; in re Matanlié* (1) and *Ex parte Vale; in re Bannister* (2).

It is true *Ex parte Schulte* (1) was decided upon section 95 of the Bankruptcy Act, 1869; but section 165 of the Act of 1849, and section 47 of the Act 6 Geo. 4. c. 16, are to the same effect.

Herbert Reed, for the respondent.—Under the Act 46 Geo. 3. c. 135. section 2, it was held that the onus of proving notice of an act of bankruptcy was upon the person who relied upon it—*Robinson* v. *Vale* (3).

In *Ex parte Schulte* (1) an execution creditor was seeking to retain property which had vested in the trustee by the doctrine of relation back; such a case does not apply to a creditor seeking to prove in a bankruptcy.

BAGGALLAY, L.J.—Section 165 of the Act of 1849 was in substance a repetition of section 47 of the Act 6 Geo. 4. c. 16, which again was a repetition of section 2 of the Act 46 Geo. 3. c. 135. Assuming, therefore, everything else in favour of the claimant's right to prove, the question is whether Bassil, at the time when he obtained his judgment, had notice of the prior act of bankruptcy on which the adjudication was founded? I am clearly of opinion that in a case of this kind when a person is claiming the benefit of the protection given by the Act, the onus is on him to shew that he had no notice of the prior act of bankruptcy. *Ex parte Schulte* (1) is a direct decision that under section 95 of the Bankruptcy Act, 1869, the onus was on an execution creditor to prove that he had no notice of a prior act of bankruptcy, and I think the principle of that decision equally applies to the present case. I can quite understand the difficulty there is in proving this absence of notice after a lapse of forty years; but that arises from the delay in taking steps to establish the claim. No blame attaches to the original creditor for not coming forward to prove in the first instance; it was not worth his while to throw good money after bad. But if he had attempted to establish this claim he would have been bound to prove that he had no notice of the act of bankruptcy committed prior to the date of his judgment. The proof must be rejected.

COTTON, L.J.—I am of the same opinion. The proof is on a judgment of which we do not know whether it was founded on

* *Coram* Baggallay, L.J., Cotton, L.J., and Lindley, L.J.

(1) Law Rep. 9 Chanc. 409.

(2) 50 Law J. Rep. Chanc. 787; Law Rep. 18 Ch. D. 137.

(3) 2 B. & C. 762.

tort or on contract. I agree with Lord Justice Baggallay that the claimant is coming forward to prove under the provisions of an enabling section, and that consequently it is for him to bring himself within the protection or benefit conferred by the section. On the mere words of the section, I am of opinion that the person who claims the benefit must assume the burden of proving the facts which entitle him to it. At any rate, he must give some *prima facie* evidence of them. This view is, no doubt, supported by *Ex parte Schulte* (1), which was decided under the Act of 1869. It is said that that case is distinguishable from the present, because there the claim was to property which would otherwise have vested in the trustee by reason of the relation back of his title to the act of bankruptcy. I am of opinion that there is no real distinction between the two cases. The claimant is seeking to compete with the other creditors for a share of the assets; the trustee claims the assets for the purpose of distribution among all the creditors. The claimant is seeking to lessen the dividend payable to the other creditors; and he stands, for the present purpose, in exactly the same position as an execution creditor who is seeking to diminish the assets available for distribution among the creditors. In my opinion there is no distinction between the two cases. But I rest my decision on the construction of section 165 of the Act of 1849. It is said that the judgment is *prima facie* evidence of a previously existing debt; but there is nothing to shew that the judgment was obtained in respect of a debt at all.

LINDLEY, L.J.—I am of the same opinion. In order to avail himself of this exceptional privilege the claimant must comply with the statutory requirement—that is, he must prove that the judgment creditor had at the date of the judgment no notice of the prior act of bankruptcy. This he cannot do, and his proof must consequently be rejected.

Solicitors—Still & Son, for appellants; Iliffe, Russell & Co., for respondent.

1884. Dec. 9. THE BOURNEMOUTH COMMISSIONERS (THE URBAN SANITARY AUTHORITY FOR THE DISTRICT OF BOURNEMOUTH) *v.* WATTS.

Local Government—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 150 *and* 174 *— Sewering, &c., Street — Liability of Owner of Premises abutting on Street—Work done by Urban Authority under Contract—Contract not under Seal.*

It is no defence to an action by an urban authority to recover from an owner in default under section 150 *of the Public Health Act*, 1875, *his proportion of expenses of paving, &c., a road, that the work was done for the authority under a contract exceeding in amount* 50*l.*, *and that such contract was not under seal as required by section* 174 *of the Act.*

Appeal by Case stated from the judgment of the County Court Judge of Hampshire.

This is an action brought to recover the sum of 7*l.* 16*s.* 10*d.*, being the proportion alleged to be due from the defendant for the cost of making good and sewering the Heathpoult Road (continuation), Bournemouth, and the following are the particulars of the plaintiffs' claim annexed to the summons:—

"The plaintiffs demand payment of the following

"Proportion in respect of Manley Lodge of the cost of making good and sewering the Heathpoult Road (continuation) under section 150 of the Public Health Act, 1875, as by the surveyor's apportionment—

	£	s.	d.
	7	13	0
"Interest at five per cent. per annum from the 17th of August, 1883	0	3	10
	£7	16	10"

The case was tried before me on the 26th of March, 1884, when it was proved or admitted that the defendant was the owner of the premises abutting on the Heathpoult Road, Bournemouth, which is a street (not being a highway repairable by the inhabitants at large) within the district of the plaintiffs as the urban sanitary authority, which was not sewered, levelled, paved, &c., to the satisfaction of the plaintiffs, and that notice pursuant to

the Public Health Act, 1875, section 150, had been served upon the defendant, among others, to sewer, level, pave, &c., the said road. It was also proved that all the requirements of the said section had been complied with by the plaintiffs, and that the work was not done by the defendant, but had been done by the plaintiffs pursuant to the said 150th section.

The work was done partly by the staff of labourers and workmen in regular permanent employ of the plaintiffs, and partly by contractors. The total cost of the work was 101*l.* 5*s.*, of which 75*l.* 17*s.* 6*d.* was the amount paid to such contractors. The said sum of 101*l.* 5*s.*, being the expenses incurred by the plaintiffs in executing the work, was apportioned by the surveyor of the plaintiffs amongst the different owners fronting, &c., the said road, amongst whom was the defendant, and he was served with notice of such apportionment, and did not appeal against it: the amount apportioned to him being the above-named sum of 7*l.* 13*s.*

No contract in writing under the seal of the plaintiffs for the work was produced or proved; and it was admitted that the plaintiffs had not complied with any of the provisions of section 174 of the Public Health Act, 1875.

The defendant contended that the plaintiffs were not entitled to recover unless they proved that the requirements of the 174th section of the Public Health Act, 1875, had been complied with by them, such section having been, as he contended, enacted for the benefit of the ratepayers and owners of property, to protect them from improvident contracts on the part of the plaintiffs as such urban authority.

I reserved my decision until the 23rd of April, 1884, when I gave judgment for the plaintiffs, holding that the provisions of section 174 of the Public Health Act, 1875, were directory only, and that the non-compliance therewith by the urban sanitary authority was no answer to the plaintiffs' claim in this action; but I gave the defendant leave to appeal.

The question for the opinion of the High Court is, whether under the circumstances herein stated the non-compliance by the plaintiffs with the provisions of the Public Health Act, 1875, section 174, was an answer to the plaintiffs' claim on the defendant in this action. If it was, judgment is to be entered for the defendant; if not, my judgment for the plaintiffs is to stand.

Macaskie, for the defendant appellant. —The County Court Judge held that section 174 was merely directory; but it has been held to be obligatory in *Young* v. *The Mayor of Leamington* (1); so unless this contract were under seal it was void, and could not be enforced against the local authority.

[HAWKINS, J.—Is there anything to prevent the local authority from paying on a verbal contract? He referred to *The Queen* v. *The Mayor of Norwich* (2).]

Section 150 only entitles the authority to recover from the owners the "expenses incurred" by them, and if there was no liability to the contractor it is a voluntary payment which cannot be charged against the owners. *Hesketh* v. *Atherton* (3) shews that the owner may take objection when called on to pay the proportion claimed. The board are trustees for the ratepayers, and are bound not to make voluntary payments; the ratepayers would be deprived of the safeguard if it were otherwise.

[SMITH, J.—Section 257 makes the apportionment binding on the owner. How can he now raise a question which only affects part of the sum claimed?]

In the case of *The Queen* v. *The Mayor of Norwich* (2) there was a mistake in the estimates, which is quite different from this case.

[HAWKINS, J.—But it decided that there was no misapplication of the funds.]

Nowell v. *The Mayor of Worcester* (4) and *Frend* v. *Dennett* (5) shew the strictness with which these statutory conditions must be fulfilled.

H. Tindal Atkinson, contra, was not called on.

(1) 52 Law J. Rep. Q.B. 713; Law Rep. 8 App. Cas. 517.
(2) 30 W. R. 752.
(3) 43 Law J. Rep. M.C. 37; Law Rep. 9 Q.B. 4.
(4) 9 Exch. Rep. 457; 23 Law J. Rep. Exch. 139.
(5) 27 Law J. Rep. C.P. 314.

Bournemouth Commissioners v. *Watts.*

HAWKINS, J.—I have no doubt as to the liability of the defendant in this case. The local authority had to sewer and pave a road under the powers of the Public Health Act, and were empowered to do the work themselves and charge the expenses upon the owners, of whom the defendant was one, he being an owner in default within section 150. They entered into a contract for part of such work, and had such contract been under seal as required by section 174 no question could have arisen. But the board having paid the contractor for his part of the work done, and having done the rest themselves, when they demand from the defendant payment of his proportion of the expenses, are met with the objection that the contract was for 75*l.*, was not under seal, and was therefore void. I am clearly of opinion that this was not a valid objection. It could not, of course, possibly prevail as to the cost of the work done by the board themselves—to the difference, that is, between 75*l.* and 105*l.*—and the claim here is for defendant's proportion of the whole sum. But if this objection applied to the whole sum, I should still be of opinion that it is no answer to the action. Under section 150 the edefndant ought to have done the work himself; it has, on his default, been actually done by the board and their contractor. Now, although under section 174 the board might as against the contractor, if he sued them, have raised the defence of contract not under seal, still, the work having been properly done, they were fully justified in not setting up the technical defence; and having incurred the expense for the work done, they can charge the defendant with his proportion.

The case of *The Queen* v. *The Mayor of Norwich* (2) is really conclusive, following *The Queen* v. *Prest* (6), that such a technical defence may be waived, and that a payment made under such circumstances cannot be treated as a misapplication of funds by the authority making it.

SMITH, J.—I am of the same opinion. It is said that the board ought to have taken this objection and not paid the contractor, as was done in *Hunt* v. *The Wimbledon Local Board* (7); but I think that it is not incumbent on a board to set up the defence of the want of a seal, and my judgment is not inconsistent with anything said in that case. Then having paid the money to the contractor, I think that it was an expense "incurred" within section 150, and the defendant could be charged with his proportion. The case of *The Queen* v. *The Mayor of Norwich* (2) satisfies me as to what our decision on this view of the case should be. Then another point is, I think, equally fatal to the defendant. He is in effect trying to reopen the apportionment; he admits his liability as to the work done by the board's own workmen, but disputes it as to that done by the contractor. How does he avoid the operation of section 257? That says that the apportionment is conclusive unless he takes the objection at the proper time and in the proper way, as shewn in sections 150 and 257. He is indeed entitled, when proceedings are taken to enforce payment, to shew that he is under no liability at all because of the road being repairable by the inhabitants at large, or his not being a frontager; but the amount of the apportionment if not disputed at the proper time cannot be disputed later on. I think that the County Court Judge was right, and the appeal must be dismissed.

Judgment affirmed.

Solicitors—Lovell, Son & Pitfield, agents for J. & W. H. Druitt, Bournemouth, for plaintiffs; Taylor, Hoare, Taylor & Box, agents for Nodder & Gater, Salisbury, for defendant.

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(6) 16 Q.B. Rep. 32; 20 Law J. Rep. Q.B. 17

(7) 48 Law J. Rep. C.P. 207; Law Rep. 4 C.P. D. 48.

[IN THE COURT OF APPEAL.]

BANKRUPTCY. 1884. July 11. } *In re* SALKELD; *ex parte* GOOD.*

Bankruptcy—Leasehold Interest of Bankrupt—Partner of Bankrupt compelled to pay Rent—Disclaimer by Trustee—Imposition of Terms—Trustee and Cestui que Trust—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 23 — *Bankruptcy Rules*, 1871, *rule* 28.

T. & S. were partners and joint lessees of certain business premises. On dissolution of the partnership the lease was assigned to S., he undertaking the liabilities of the business and covenanting to pay the rent and T. covenanting to stand possessed of his interest in the premises as trustee for S. S. filed a liquidation petition, and the trustee sublet the premises at a nominal rent in order to keep the machinery in working order and prevent deterioration from disuse. The trustee refused to pay rent, part of which was due at the date of the liquidation and part of which had since accrued. T. was compelled to pay it:—Held, *that the trustee could only obtain leave to disclaim the lease upon the terms of his paying to T. the rent of the premises as from the date of his appointment until the day when his beneficial occupation thereof ceased.*

The debtor, John Salkeld, was previously to the 20th of March, 1882, in partnership with John Thomlinson, with whom he carried on the business of plaster and cement manufacturers.

By an indenture dated the 1st of January, 1875, certain plaster beds and hereditaments, together with certain plant and machinery, were demised by Earl Ferrers to John Thomlinson and the debtor for the term of twenty-one years from the 25th of March, 1874, subject to the payment of a rent and royalties.

By an indenture dated the 20th of March, 1882, the partnership was dissolved on the terms that the debtor should continue the business and take over all the assets and liabilities of the firm, and pay to Thomlinson the sum of 12,000*l.* by certain instalments; and the said lease was assigned to the debtor, he covenanting to pay the rent and perform the covenants therein contained.

By the same deed Thomlinson covenanted with the debtor that he would, as from the 31st of December, 1881, stand possessed of all his estate and interest in the premises comprised in the indenture of the 1st of January, 1875, in trust for the debtor.

And by another indenture of the 20th of March, 1882, the debtor covenanted with Thomlinson to pay him the sum of 12,000*l.* by forty equal half-yearly instalments of 300*l.* each; and the debtor assigned to Thomlinson all the buildings, engines, plant, and machinery upon any of the partnership premises, by way of mortgage, to secure the payment of the 12,000*l.* and interest.

On the 18th of June, 1883, the debtor filed a liquidation petition, and at the first meeting of creditors resolutions were passed for a liquidation by arrangement; and on the 18th of July, 1883, Alfred Good was appointed trustee.

At the date of the liquidation rent was due to Earl Ferrers in respect of the premises comprised in the lease, and Thomlinson was compelled to pay this rent, and further rent which had accrued since the date of the liquidation petition.

On the 20th of July, 1883, the trustee let the premises comprised in the lease of the 1st of January, 1875, to C. A. Salkeld, the debtor's son, at the rent of 4*l.* per month, in order to keep the machinery and plant in working order and to prevent injury to the same from disuse, the tenancy to be determinable at one month's notice in writing on either side.

On the 11th of January, 1884, the trustee applied to the Court for leave to disclaim the debtor's interest in the lease.

The Registrar (Mr. Pepys) made an order giving the trustee liberty to disclaim, conditionally upon his paying the rent of the premises to Thomlinson as and from the date of his appointment until the day when his beneficial occupation thereof ceased.

The trustee appealed.

* *Coram* Baggallay, L.J., Cotton, L.J., and Lindley, L.J.

R. Vaughan Williams, for the trustee.—No terms ought to have been imposed upon the trustee—*Ex parte Ladbury* (1), *Ex parte Isherwood ; in re Knight* (2), *Ex parte Izard ; in re Bushell* (3), and *Ex parte Arnal ; in re Witton* (4). The principle of all these cases in which compensation is given to the landlord for the rent of which he is deprived by the occupation of the trustee is that he has a claim which he cannot enforce in any other way. Thomlinson is entitled to prove in the liquidation for the 12,000*l.*, and he can also prove on the covenant for indemnity contained in the deed of the 20th of March, 1882.

F. Cooper-Willis, for Thomlinson, was not called upon.

BAGGALLAY, L.J., stated the facts and continued:—Possibly the Registrar's order may mean that the trustee is personally to pay the rent. But it is not an order that he do pay the money; it is only an order giving him leave to disclaim on condition of his paying it. The substantial question is, whether Thomlinson should be allowed to receive this particular amount of rent in full, he having paid it to the landlord, or whether he is only entitled to a dividend upon it by virtue of the contract of the 20th of March, 1882. It is said that this condition ought not to be imposed on the trustee, because he has not had any beneficial occupation of the property. It has been clearly established by a series of cases—*Ex parte Ladbury* (1), *Ex parte Isherwood* (2), *Ex parte Izard* (3), and *Ex parte Arnal* (4)—that in determining whether, on giving leave to a trustee to disclaim a lease belonging to a bankrupt, he shall be required to pay compensation to the landlord, the Court will have regard, not merely to the actual benefit which has resulted to the estate from the trustee's occupation, but whether the possession was retained by him with the view of obtaining a profit for the estate. In the present case a lease was granted by the trustee of the ovens and machinery on the property to the debtor's son at an almost nominal rent, the object being that this machinery should be kept in proper order until an opportunity should arise of disposing of it for the benefit of the estate. I have no doubt that the possession of the property was retained by the trustee with the view of obtaining a benefit for the estate, and therefore the case is one in which the trustee would have been required to pay compensation to the landlord. If the landlord had not been paid the rent, the rule would have applied that leave to disclaim ought to be given only on the terms of the trustee's making compensation to the landlord. The Registrar thought it right to have the co-lessee as well as the landlord before him, and it seems to me that he was fully justified in requiring the trustee to pay to Thomlinson that compensation which, if he had not paid the rent to the landlord, the trustee would have been required to pay to the landlord. If this condition was not imposed, the trustee would have had the beneficial occupation of the property without paying anything for it. The principle which applies to the case of a landlord appears to me to apply equally to the case of a person who has actually paid the rent to the landlord. This, I think, is sufficient to dispose of the case, and to shew that the Registrar's conclusion was right in principle. This Court will not interfere with the amount of compensation fixed by him, unless it can see that he has assessed it on a wrong principle.

COTTON, L.J.—I think the Registrar's order is right. Of course this case is different in its circumstances from previous cases, but certain rules have been laid down by those cases. The first question is whether the trustee's occupation of the leasehold premises has either been beneficial to the bankrupt's estate, or was contemplated as likely to be beneficial to it. If so, the cases shew that compensation ought to be required to be given to the landlord as a condition of allowing a

(1) 50 Law J. Rep. Chanc. 838; Law Rep. 17 Ch. D. 532.
(2) 52 Law J. Rep. Chanc. 370; Law Rep. 22 Ch. D. 384.
(3) 52 Law J. Rep. Chanc. 678; Law Rep. 23 Ch. D. 115.
(4) 53 Law J. Rep. Chanc. 134; Law Rep 24 Ch. D. 26.

disclaimer of the lease, because, inasmuch as by virtue of the disclaimer the lease would be put an end to as at the date of the trustee's appointment, the landlord would have no other remedy. In the present case the trustee's occupation was clearly intended for the benefit of the debtor's estate; the object was to keep the machinery and other chattels in such a condition that they should realise as much as possible for the estate. The next question is, whether it is right to require the trustee to make compensation for that beneficial occupation, not to the landlord but to Thomlinson. Thomlinson's position was this—he was legally liable to pay the whole rent to the landlord, but he had no beneficial interest in the property. He was a trustee of his interest in the lease for the debtor. If the landlord had not been paid his rent, it would, according to the previous decisions, have been right to require the trustee to pay compensation to him in respect of his beneficial occupation. Thomlinson, by virtue of his position as a trustee, and independently of any express contract, is entitled to be indemnified by his *cestui que trust* against his legal liability under the lease, and has for that purpose a lien on the interest of his *cestui que trust* in the lease; and when the trustee in the liquidation comes to the Court and asks that he may be allowed to put an end to that interest as from an antecedent period, I think the Registrar was right in allowing this only on the terms of his paying compensation to Thomlinson, who by the disclaimer would be deprived of the lien which he would otherwise have had.

LINDLEY, L.J.—I have arrived at the same conclusion. I do not regard the case as a simple one of landlord and tenant. Thomlinson stood in a peculiar position. He was a joint lessee with Salkeld, and he afterwards became a trustee of his own interest in the lease for Salkeld. The trustee in the liquidation when he was in possession of the property was Thomlinson's *cestui que trust*. Thomlinson was liable to the landlord, and he had a lien on the beneficial estate of his *cestui que trust* for his indemnity. He was in fact a secured creditor, and when the property on which he had a security is taken away, I think he should be treated as if he had that lien still. No doubt he had a right to prove in the liquidation, but he was also a secured creditor.

Solicitors—Surr, Gribble & Co., for appellants; Ullithorne, Currey & Villiers, for respondent.

[IN THE COURT OF APPEAL.]

1884. Dec. 8, 9. } ASPEY *v.* JONES AND OTHERS.*

*County Court—Jurisdiction of Judge to Order Repayment of Money paid out of Court to Execution Creditor by Mistake—Warrant under Seal of Court for Amount—Non-liability of Registrar and Bailiff or other Person acting under—*13 *&* 14 *Vict. c.* 61. *s.* 19—15 *&* 16 *Vict. c.* 54. *s.* 6.

Section 19 *of* 13 *&* 14 *Vict. c.* 61, *and section* 6 *of* 15 *&* 16 *Vict. c.* 54, *protect the Registrar of a County Court and the bailiff and his assistants from liability to be sued in an action for seizing the goods of a party under a warrant of the Court signed by the Registrar and under the seal of the Court, even assuming that the Judge had no jurisdiction to make the order upon which the warrant is founded.*

Section 6 *of* 15 *&* 16 *Vict. c.* 54 *also affords a like protection to any person who acts under a warrant so issued.*

Appeal from a judgment of the Queen's Bench Division on a Special Case.

Action to recover damages for unlawfully entering the plaintiff's house and seizing and carrying off his goods and selling them. The defendants were the Registrar of the County Court at Brighton, the high bailiff of that Court, and one Bennett.

In June, 1880, the plaintiff in the present action recovered judgment against one Moreland in the County Court for 3*l.* 8*s.* 6*d.*, and thereupon certain goods which were in Moreland's house were seized in execution. Bennett laid claim

* *Coram* Brett, M.R., Cotton, L.J., and Lindley, L.J.

to the goods in question; and in the result, Moreland, being told that he could pay the amount of the execution into Court to abide the decision of the County Court Judge as to the ownership of the goods, borrowed the necessary amount and paid it into Court, giving at the same time notice in writing to the bailiff that he had done so under protest to abide the event of the interpleader proceedings, and also that he had borrowed the money.

Subsequently the warrant-money and notice were handed by the bailiff to his superior, who considered the money to belong to Moreland, and as Bennett had made no claim in writing, disregarded the notice, treated the money as having been paid in satisfaction of the execution, and paid it over to the Registrar's clerk without telling him of Bennett's claim or of the conditions upon which the money had been accepted by the bailiff. The money was entered in the County Court books as having been paid in satisfaction of the judgment and execution, and was, on the application of the plaintiff, paid out to him. After various applications on the part of Moreland the County Court Judge, on the 23rd of July, made an order that Aspey should within four days from the service on him of an interpleader summons then to be issued return the money which had been erroneously paid out to him, it having, in fact, been paid into Court to abide the result of the interpleader proceedings as to whether the goods in question belonged to Bennett or not; and in default thereof Bennett was to be at liberty to recover the sum from Aspey by issuing a warrant of execution. An interpleader summons was duly issued and served on Aspey, but, as he did not repay the money, the defendant Jones, as Registrar, and at the request of Bennett, issued under the seal of the Court on the 29th of July a writ of *fieri facias* as a warrant of execution, under which the bailiff and his officers seized the plaintiff's goods, levied the amount ordered to be repaid, and paid it into Court. The interpleader proceedings resulted in favour of Bennett. The plaintiff thereupon brought the present action.

At the trial it was agreed that a Special Case should be stated for the opinion of the Court.

The Queen's Bench Division (Denman, J., Williams, J.; Manisty, J., *dissentiente*) gave judgment for the defendants, being of opinion that the County Court Judge had jurisdiction to make the order dated the 23rd of July, and that the defendants were protected by statute from liability for any acts done by them under the order in question.

The plaintiff appealed.

Gates, Q.C., and *Corrie Grant*, for the plaintiff.—The County Court Judge, being *functus officio* at the time, had no jurisdiction to make the order for repayment of the money paid by mistake—*Andrews* v. *Marris* (1), *Carratt* v. *Morley* (2), *Lander* v. *Gordon* (3), *Irving* v. *Askew* (4), and *The Great Northern Railway Company* v. *Mossop* (5). The Judge of an inferior Court cannot, by finding the facts in a particular way, give himself jurisdiction —*The Mayor of London* v. *Cox* (6). The order was merely an order of the Judge, and not in the nature of a final judgment, so that execution could not be issued without a further order being made by the Judge. Even if the money had been impressed with a trust, the proceedings in the County Court were an attempt to make liable a person who was not a party to the breach of trust. Section 19 of 13 & 14 Vict. c. 61, and section 6 of 15 & 16 Vict. c. 54, only protect the Registrar and bailiff where they have been acting under a proper warrant; but they do not apply where the warrant is bad on the face of it.

[BRETT, M.R.—*Dews* v. *Riley* (7) shews that the clerk of a County Court is merely a ministerial officer to carry into effect the order of the Judge, even though the order upon which the warrant is founded is bad, and he is therefore protected by 13 & 14 Vict. c. 61. s. 19.]

The officers of the Court are not pro-

(1) 1 Q B. Rep. 3.
(2) 1 Q.B. Rep. 18.
(3) 7 Mee. & W. 218.
(4) 39 Law J. Rep. Q.B. 118; Law Rep. 5 Q.B. 208.
(5) 17 Com. B. Rep. 130; 25 Law J. Rep. C.P. 22.
(6) 36 Law J. Rep. Exch. 225; Law Rep. 2 E. & I. App. 239.
(7) 11 Com. B. Rep. 434; 20 Law J. Rep. C.P. 264.

tected where the warrant is bad on the face of it; here the warrant was bad, not being in compliance with the forms given. The warrant, although given under the seal of the Court, is not such a warrant as was contemplated by the Acts. *Dews* v. *Riley* (7) merely shews that it is the duty of the officers to fill up the forms, and the sections referred to only protect them for any irregularity in a warrant which is a proper warrant—19 & 20 Vict. c. 108. s. 60, and 30 & 31 Vict. c. 142. s. 31. The County Court Rules, 1875, Order XIX. rule 1, Order XXXVII. rule 53, and Form No. 33 were also referred to.

Danckwerts (with him *The Attorney-General* (*Sir H. James, Q.C.*) and *R. S. Wright*), for the defendants.—Section 60 of 19 & 20 Vict. c. 108 is intended to give a remedy, and not to take away any remedy which already exists. The person who has been guilty of any irregularity is the person to be sued; but it is only the duty of the officers of the Court to carry into effect the order of the Judge, and not to enquire into what the Judge has done—*Andrews* v. *Marris* (1) and *Carratt* v. *Morley* (2). The case of *Dews* v. *Riley* (7) is to the same effect, and shews that both the officers of the Court are protected by 13 & 14 Vict. c. 61, section 19. Section 6 of 15 & 16 Vict. c. 54 applies to any person, even though he only comes forward and states his case to the Court. The warrant being under the seal of the Court was good.

[He was stopped.]

BRETT, M.R.—Assuming for the purposes of this case that everything which was done in the County Court was as irregular as could be; also assuming, although this must not be taken as our decision on the point, that the County Court Judge had no jurisdiction to make the order directing a warrant to be issued to levy upon the plaintiff's goods, it seems that the Registrar, in accordance with that order, which was a judgment of the County Court Judge, did issue a warrant under which the plaintiff's goods were seized in conformity with the directions contained in the warrant, which, whether justified or not, was a warrant to the officers of the Court to seize the plaintiff's goods. This action is brought against the defendants for a mere seizure of the plaintiff's goods, and not in respect of the mode in which they were seized, and is therefore brought against them in respect of what was done in conformity with the directions contained in the warrant itself. The question is, whether, upon the assumptions which I have made, the plaintiff is entitled to maintain the action against any one or all of the defendants. In my opinion they are all protected by statute. Section 19 of 13 & 14 Vict. c. 61 provides that no action is to be brought against any high bailiff or bailiff for anything done in obedience to any warrant under the hand of the clerk—now the Registrar (8)—of the Court and the seal of the Court until a demand has been made by the party intending to bring the action of the perusal and copy of the warrant and the same has been refused for six days after the demand. Even if all these conditions had been fulfilled, it is further provided that, on the production of the warrant at the trial, the jury are to give a verdict for the defendant, notwithstanding any defect of jurisdiction or other irregularity in the warrant. If, therefore, the warrant is under the hand of the Registrar and the seal of the Court, the bailiff is protected upon the production of the warrant, notwithstanding any defect of jurisdiction or other irregularity in such warrant. It was argued that the section does not apply if there be any irregularity or want of jurisdiction in fact which also appears upon the face of the warrant; but it was admitted on the other hand that the section would apply if any want of jurisdiction or irregularity did in fact exist which does not appear upon the face of the warrant. Such a contention would, however, lead to this, that the officers of the Court, who are mere ministerial officers, would be bound to read a warrant, and pass their own judgment upon it whether it was regular and whether the Judge had jurisdiction to make the order under which it was issued. It is however sufficient for the officers to see whether the warrant is under the hand of the Registrar and the seal of the Court, and if it is, then they are protected. I also think that the Registrar is

(8) 19 & 20 Vict. c. 108. s. 8.

protected, because he is here sued, not for having issued an improper warrant, but in respect of what he has done under the warrant. *Dews* v. *Riley* (7) shews that this protection is extended to the clerk or Registrar; and, in addition, there is also section 6 of 15 & 16 Vict. c. 54, which provides that if any action is brought against any person for anything done in pursuance of any County Court Act, such person may give the special matter in evidence, and the warrant under the seal of the Court being produced is to be deemed sufficient—not *prima facie*—proof of the authority of the County Court previous to the issuing of the warrant. The effect of that section seems to me to be that, any person who acts under such a warrant is protected from an action for anything done except an irregular proceeding under the warrant; for the warrant itself is sufficient proof of the authority of the County Court previous to the issuing of the warrant, and the party who acts under it is not to see whether the Court had jurisdiction to make the order which directs the warrant to issue. Therefore the Registrar as well as the bailiffs, and also any person who has submitted his case to the Court and has obtained the order and warrant of the Court, are also protected by section 6 of 15 & 16 Vict. c. 54. The defendants here are therefore protected under these two sections by the mere fact that the warrant was under the seal of the Court and that nothing was done by them under it except what was directed by it. An action cannot therefore be maintained for the mere seizure of goods under the warrant. The proceedings in the County Court being complicated, and there having also been a difference of opinion in the Court below, the plaintiff was justified in questioning those proceedings, and the appeal will be dismissed without costs.

COTTON, L.J.—I am of the same opinion. There has been a good deal of argument to shew that the order in question was one which could not be justified, and that the Judge had no jurisdiction to make it. It was said that the sections relied on only referred to warrants such as are specified in the forms given in the Acts. But, in my opinion, that is not so. Even if there were any defect of jurisdiction or other irregularity in the warrant, it is a warrant of the Court signed by the Registrar and under the seal of the Court. That objection cannot prevail; if it were otherwise, an onerous duty would be thrown upon the officers of the Court to see whether a warrant was good or bad.

LINDLEY, L.J.—I am of the same opinion. The sections are so worded as to confer the protection claimed.

Appeal dismissed.

Solicitors—Baker, Blaker & Hawes, agents for Schomberg, Prince & Co., Brighton, for plaintiff; Hare & Co., agents for the Solicitor to the Treasury, for defendants.

[IN THE COURT OF APPEAL.]

1884. Dec. 3.

WEBSTER *v.* MYER.*

Practice—Lapse of One Year since the Last Proceeding—Notice of Intention to Proceed—Judgment by Default—Rules of Court, 1883, *Order LXIV. rule* 13.

Where in an action there has been no proceeding for one year from last proceeding had, a plaintiff who desires to sign judgment must give to the defendant a month's notice of his intention to proceed, even though the defendant did not enter an appearance to a specially indorsed writ issued and served by the plaintiff.

Motion *ex parte* after refusal by the Queen's Bench Division.

In September, 1881, the plaintiff issued a specially indorsed writ, which was served on the defendant in December, 1881. The defendant did not appear to the writ, and the plaintiff took no further step until November, 1884, when he applied to the Queen's Bench Division to be allowed to sign judgment for default of appearance. The affidavit of service was sworn in September, 1884. The Queen's Bench Division refused the motion, on the ground that he had not given a month's notice to the other party of his intention to proceed, and therefore that he had not complied

* *Coram* Brett, M.R., and Lindley, L.J.

with the requirements of Order LXIV. rule 13 (1).

The plaintiff appealed.

Poulter, for the appellant.—No doubt more than one year has elapsed since the last proceeding was taken; but it was held under the Rules of Hilary Term, 1853, and the rules in force before those rules, that notice was not required in such a case after verdict. *May* v. *Wooding* (2), *Newton* v. *Boodle* (3), and the rules on which those cases were decided, were substantially to the same effect as the rule now in force. It was decided in *Thompson* v. *Langridge* (4) that a plaintiff could enter up judgment on a *cognovit* given before appearance, upon which no step had been taken for more than a year, without giving a term's notice. In this case there is no matter in controversy: the defendant has not appeared, he has allowed judgment to go by default, so that he in fact confesses the cause of action, and the plaintiff is entitled to sign judgment without giving a month's notice. In *The Staffordshire Joint Stock Bank* v. *Weaver* (5) Field, J., at chambers, held that a month's notice must be given; but that decision would seem not to be in harmony with the previous practice, as explained in *Chitty's Archbold*, 13th ed. p. 180.

BRETT, M.R.—Is signing judgment a proceeding? By Order XIII. rule 3, "Where a writ of summons is indorsed for a liquidated demand, whether specially or otherwise, and the defendant fails or all the defendants, if more than one, fail to appear thereto, the plaintiff may enter final judgment for any sum not exceeding the sum indorsed on the writ." To do this the plaintiff must shew that the writ has been served—that is, he must take certain steps and do certain things, and then he can, in the circumstances specified, get judgment signed. That is, some step must be taken to enable him to get judgment and execution, or to get relief, as the case may be. That step is, I think, a proceeding; and then I find that Order LXIV. rule 13 says, "In any cause or matter in which there has been no proceeding for one year from the last proceeding had, the party who desires to proceed shall give a month's notice to the other party of his intention to proceed." So that if there has been no proceeding taken towards that judgment which gives the remedy or relief sought for one year, then, by the terms of the rule, a month's notice is required. If that which by Order XIII. rule 3 is a necessary process to get judgment can be said to be a proceeding, then the plaintiff is in this case within the very words of Order LXIV. rule 13.

It has been urged that there are two cases which shew that the provisions of this rule do not apply to a case of default of appearance; and the suggestion is, that those cases were decided upon a rule similar in terms to the present rule, and therefore that they give a principle for the interpretation of this rule. But those decisions were given in cases in which a verdict had passed, and the rule on which they were given was, though similar to, not the same as this rule. It is not necessary to say whether those decisions were or were not correct, regard being had to the rule which was in force when they were given; but, assuming that they do apply to the rule now in force, then I am of opinion that they are not to be carried farther, and that they must be confined to cases in which a verdict has passed. This case seems to me to fall within the terms of the rule. The application must be refused, and the proper notice must be given.

LINDLEY, L.J.—I am of the same opinion. It seems to me that this application is in fact an application to the Court to repeal rule 13 of Order LXIV., and that it must be refused.

Application refused.

Solicitor—Appellant in person.

(1) Rules of Court, 1883, Order LXIV. rule 13: "In any cause or matter in which there has been no proceeding for one year from the last proceeding had, the party who desires to proceed shall give a month's notice to the other party of his intention to proceed. A summons on which no order has been made shall not, but a notice of trial, although countermanded, shall, be deemed a proceeding within this rule."

(2) 3 M. & S. 500.

(3) 3 Com. B. Rep. 795.

(4) 1 Exch. Rep. 351.

(5) Weekly Notes, 1884, p. 78.

[IN THE COURT OF APPEAL.]

1884. Nov. 19, 20. Dec. 1. THE MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY COMPANY *v.* THE DENABY MAIN COLLIERY COMPANY.*

Railway—The Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 20), *s.* 90—*Grouping of Rates—Undue Preference—Action for Overcharges—Railway and Canal Traffic Act*, 1854 (17 & 18 *Vict. c.* 31), *ss.* 2, 3, *and* 6.

No action can be maintained for a breach of section 2 *of the Railway and Canal Traffic Act*, 1854, *for the word "proceeding" in section* 6 *of that Act includes action, and the only remedy is that given by section* 3.

By 8 & 9 *Vict. c.* 20. *s.* 90, *railway companies are empowered to alter or vary the tolls fixed by their Acts, provided that all such tolls be at all times charged equally to all persons and after the same rate in respect of all passengers and of all goods or carriages of the same description and conveyed by a like carriage "passing only over the same portion of the line of railway under the same circumstances, and no reduction or advance in any such tolls shall be made either directly or indirectly in favour of or against any particular company or person":*—Held, *that this section empowers a railway company to vary its tolls within the limits set by its special Act; that the words "passing only over the same portion of the line" mean passing between the same points of departure and arrival and passing over no other part of the line; that the words "under the like circumstances" mean under like circumstances as regards the services performed by the railway company in receiving, carrying, and delivering the goods; and that the prohibition against favour shewn to any particular person is not more extensive than the equality clause which precedes it, but is confined to cases in which goods of a similar description are carried only between the same termini and under the same circumstances.*

A railway company charged one uniform set of rates for the carriage of goods from forty-eight different collieries to a number of places lying eastward of those collieries, so that D. whose colliery was the easternmost of these collieries was charged the same as other persons whose collieries were situated farther west and whose goods were consequently carried a greater distance:—Held, *that this did not constitute a breach of* 8 & 9 *Vict. c.* 20. *s.* 90, *as the goods carried were not carried only over the same part but also over other parts of the line.*

A railway company carried coals for D. and B. under the like circumstances as regards trouble and cost to the company, and charged B. for some of such coals less than it charged D.:—Held, *that if D. had shewn that he had sustained pecuniary loss he would have been entitled to damages; but that D. had not shewn any circumstances which would establish that the railway company was liable to him in damages for such breach of section* 90.

Appeal from the judgment of the Queen's Bench Division, reported 53 Law J. Rep. Q.B. 579, and on a Special Case stated by an arbitrator.

The Manchester, Sheffield, and Lincolnshire Railway Company sued the Denaby Main Colliery Company to recover a balance of carriage account. The colliery company counter-claimed for overcharges for goods carried between the 14th of December, 1874, and the 14th of December, 1880, being a period of six years before the commencement of the action, and for damages.

The action was referred to an arbitrator, who stated the following Special Case:—

Part I.

1. The defendants are colliery owners carrying on their business at the Denaby Main Colliery near Doncaster.

2. It is the business of the defendants to raise and sell coals for delivery in different parts of the kingdom and abroad. They deal only in coals raised from their own mines. Their colliery is situated on the line of the plaintiffs' railway, and connected with it by sidings. A large portion of their coal leaves their colliery by the plaintiffs' line, from which it passes either along the plaintiffs' line only, or along the plaintiffs' line and thence to the various

* *Coram*, Brett, M.R., Cotton, L.J., and Lindley, L.J.

lines connected therewith. The defendants' colliery has no direct communication with any other line of railway except that of the plaintiffs. The defendants sell coal at (amongst other places) Great Grimsby (hereinafter called Grimsby), Goole, and Hull.

3. Amongst the customers of the defendants are Mr. Bannister and Messrs. Josse & Co., both of whom carry on business in a large way as coal merchants at Grimsby. Messrs. Josse & Co. also carry on business at Hull and Goole. They buy coal not only of the defendants but of a large number of other owners of collieries both in the South Yorkshire coalfields and elsewhere. The plaintiffs' railway is the only railway leading from the South Yorkshire coalfield (in which the defendants' colliery is situated) to Grimsby.

4. The plaintiffs carry coal for Bannister and for Josse & Co. as well as for the defendants. The plaintiffs carry coal for the defendants, for Bannister, and for Josse & Co. from the Denaby Main Colliery to Grimsby for shipment there. Upon all the coals sold by the defendants to Bannister or to Josse & Co., and carried by the plaintiffs from Denaby Main Colliery to Grimsby (whether for shipment or for land sale as hereinafter mentioned), the carriage has been paid by Bannister or Josse & Co., as the case might be. Upon coal sold by the defendants to other customers (whether for such shipment or land sale) the carriage has been paid sometimes by the defendants and sometimes by the customers. From February, 1874, to December, 1876, the plaintiffs made to Bannister an allowance or rebate of 8*d.* per ton from the published rate of carriage in respect of all coal shipped by certain steamers known as the Hamburg American steamers.

5. The circumstances under which this allowance was made are as follows:—The Hamburg and American Steam Shipping Company had a line of steamers to the West Indies. The agents of the plaintiffs induced them to make Grimsby a calling place for their ships. They were accustomed to use Welsh coal. It was ascertained by the plaintiffs that if the Hamburg Company could get the South Yorkshire coal at a reduction of 10*d.* or a shilling on the then current prices they would buy coal at Grimsby in place of the Welsh coal. To enable this to be done, and in the hope that the South Yorkshire coal might thus be introduced to the West Indian market, the plaintiffs agreed to make Bannister an allowance of 8*d.* per ton upon the rates for carriage of South Yorkshire coal from any colliery in the South Yorkshire coalfield to Grimsby (including the Denaby Main Colliery) in respect of all coal shipped by the Hamburg American steamers. They did, in fact, make to Bannister such an allowance on all coals so shipped; but there was no evidence to shew from what particular collieries in the South Yorkshire coalfield such coal came. They gave no public or other notice that they were doing so, or that they would make similar allowances to other persons under similar circumstances. There was no contract on the part of Bannister that any definite quantity should be so shipped, and the services performed by the plaintiffs in respect of such coal were identical with those performed by them in respect of any other coal shipped at Grimsby. They did in fact carry for the defendants between February, 1874, and December, 1876, large quantities of coal for shipment at Grimsby in respect of which they charged and received the full rate (during one portion of the time 3*s.* 8*d.*, and during the residue 3*s.* 4*d.* per ton). The last-mentioned coals, except in so far as may appear in this paragraph, were carried under the same circumstances as the coals shipped by the Hamburg American steamers. The allowance in question was not known to the defendants at the time it was made, nor for several years afterwards.

The said allowance was made to Bannister only in respect of coal shipped on board the said steamers, and not in respect of any other coal carried by the plaintiffs for him for shipment at Grimsby.

6. After December, 1876, the Hamburg American steamers ceased to call at Grimsby, and the allowance thus came to an end.

7. The coal sent to Grimsby from the various South Yorkshire collieries was partly for shipment, partly for land sale at Grimsby. There were different rates for the carriage, according as coal was for shipment or for land sale. The several

rates charged from time to time during the period covered by this action for the carriage of coal for shipment and land sale were as follows :—

From the 1st of July, 1876, to July, 1878, for land sale, 4*s.* 2*d*; for shipment, 3*s.* 4*d.* From August, 1878, to June, 1879, for land sale, 3*s.* 10*d.*; for shipment, 3*s.* 4*d.* From July, 1879, to December, 1880, for land sale, 3*s.* 10*d.*; for shipment, 3*s.* 1*d.* The above charges were made to every one for whom the plaintiffs carried coal from the South Yorkshire coalfields, except Bannister and Josse & Co. Many years ago the plaintiffs agreed with Bannister to charge him in respect of coal for land sale the same rates as in respect of coal for shipment. The shipment rate was at that time 3*s.* 8*d.*, and during the whole period covered by this action Bannister continued to be charged at the rate of 3*s.* 8*d.* for land sale coal, thus giving him an allowance at one time of 6*d.* and afterwards of 2*d.* per ton. From July, 1876, to July, 1878, the plaintiffs made Josse an allowance of 4*d.* per ton upon the rates charged in respect of his land sale coal.

8. Land sale coal for persons other than Bannister and Josse & Co. has to be taken into the goods yard of the plaintiffs, and there placed on sidings and kept until taken away by the consignee. Charges for the occupation of sidings are made by the plaintiffs after the trucks have remained two days upon the siding. Bannister and Josse & Co. have coal yards of their own in Grimsby Town connected with the plaintiffs' line, and land sale coal for them during the whole period covered by this action was delivered directly into their yard, and upon such delivery the plaintiffs had nothing further to do with it. It was to the interest alike of Bannister and Josse & Co. and of the defendants to keep the trucks in which coals are delivered at Grimsby as short a time as possible, but the fact that Bannister and Josse & Co. had their own yards enabled them to return the trucks consigned to them upon the whole more promptly than the defendants could. Bannister and Josse & Co., and not the colliery owner, paid the carriage upon all coal delivered at their respective yards.

9. By reason of the matters stated in paragraph 8 it cost the company less per ton to carry coals to Grimsby Town for delivery to Bannister and Josse & Co. than for delivery there to the defendants. The plaintiffs have not shewn to my satisfaction that the allowance of either 6*d.* or 2*d.* a ton on all coal carried to Grimsby for Bannister, or that of 4*d.* a ton on all coal carried to Grimsby for Josse & Co., was adequately represented by the saving to the plaintiffs. No calculation or estimate of the amount of the saving appears to have been made when the allowance was agreed upon or at any other time. There was no difference in the amount so saved when the allowance to Bannister was 6*d.* and when it was 2*d.*, nor has any reason been given why a different amount was fixed upon as the allowance to Josse & Co. The arrangement to make an allowance of this description to Bannister was made many years ago upon the occasion of his establishing a yard of his own into which the coal might be delivered. The allowance to Josse & Co. began in 1876. The reason for making it is not otherwise explained than that it was made "at their earnest solicitation."

10. During the whole of the period covered by this action the plaintiffs have allowed to Bannister and to Josse & Co. a rebate of two per cent. upon their respective net debits in respect of coal traffic of every description (and whether in plaintiffs' or in owners' waggons) carried for them. This allowance has not been made to any one else.

11. The plaintiffs make no separate charge for the return of empty waggons. Both Bannister and Josse & Co. own a large number of waggons and deal with many collieries. The defendants own a much larger number of waggons than either Bannister or Josse & Co., and a large quantity of the coal purchased by Bannister and Josse & Co. from the defendants was carried in the defendants' waggons. Both Bannister and Josse & Co. allow the plaintiffs to take any of their empty waggons to any colliery with which Bannister and Josse & Co. respectively deal, to which it may suit the plaintiffs to send them, no matter what colliery they came from when loaded. The plaintiffs cannot return the empty waggons of the defendants to any place other than the

Denaby Main Colliery. The above statements apply both to land sale coal and to coal for shipment.

12. By reason of the matters stated in paragraph 11 the coal carried for Bannister and Josse & Co. during the period covered by the allowances aforesaid, taken as a whole, and including in the term "carriage" the dealing with empty waggons, was carried more economically to the plaintiffs than coal carried for the defendants. The plaintiffs have not proved to my satisfaction that the allowance of two per cent. upon the net debits was adequately represented by the saving to the plaintiffs, and there is no necessary relation between the two values.

13. Between July, 1874, and March, 1880, the plaintiffs allowed to Bannister 6*d.* per ton on all coal shipped by him from Grimsby to English ports south of Harwich. The circumstances under which this allowance was made are as follows:— There was little trade of this kind, and Bannister undertook to develop the trade, to provide vessels, and to run the risks incidental to the working of such a traffic; and in consideration of his doing so, and in view of the anticipated advantage to the company by the increased tonnage to be carried over their line, the plaintiffs agreed to give him 6*d.* per ton upon the number of tons shipped. This was equivalent in amount to an allowance of 6*d.* per ton upon the carriage account in respect of the coals in question. But I find that the arrangement was *bona fide* of the description above given, and, whether legitimate or not, was not made with the object of giving a preferential rate of carriage to Bannister. In the company's books the sums due were credited every quarter of a year under the description of "agency commission" for shipment of coal by coastwise "vessel to ports south of Harwich." No opportunity was afforded to the public in general, or to other persons sending coal by the plaintiffs' railway to Grimsby, of earning the like payment by the like services. The average amount of coal subject to this arrangement was about 15,000 tons per annum.

14. The allowances to Bannister and Josse & Co. in respect of the carriage of coal for land sale (the 6*d.*, 4*d.*, or 2*d.* mentioned in paragraph 7), the allowance of two per cent. on net debits mentioned in paragraph 10, and the payment of 6*d.* per ton on coal shipped from Grimsby to places south of Harwich mentioned in paragraph 13, were unknown to the defendants until they were ascertained from discovery had in the action.

15. A difference of one halfpenny per ton has been, during the period covered by this action, a material factor in determining a contract for shipment, and a difference of three halfpence per ton has been, during the same period, a material factor in determining for land sale. Each of the various allowances made to Bannister and Josse & Co. was sufficient in amount to constitute (if the defendants are allowed to complain of it) a substantial disadvantage in their competition with Bannister and Josse & Co.

16. The questions arising upon the foregoing statement are whether:—

1. The allowance of 8*d.* per ton to Bannister upon coal shipped by the Hamburg American steamers:

2. The allowance which was at one time 6*d.* and at another 2*d.* per ton made to Bannister, or that of 4*d.* per ton made to Josse & Co., upon coal carried to Grimsby for land sale there:

3. The allowance of two per cent. upon the net debits made to Bannister and Josse & Co.:

4. The payment of 6*d.* per ton to Bannister upon coal shipped from Grimsby for ports south of Harwich, constituted breaches of the Railways Clauses Consolidation Act, 1845, s. 90.

5. If either the allowance of 8*d.* per ton to Bannister upon coal shipped by the Hamburg American steamers, or the payment of 6*d.* per ton to Bannister upon coal shipped from Grimsby for ports south of Harwich, was a breach of the Railways Clauses Consolidation Act, 1845, section 90, upon what principle in either case is the amount of the overcharge to the defendants in this respect to be ascertained?

Part II.

17. During the period covered by this action, the plaintiffs had one uniform set of rules for the carriage of coal from about forty-eight different collieries to a number of places lying eastward of the said collieries, and served by the plaintiffs' railway.

18. These collieries were (and are in this

case) called "the group," and the rates from them to the said places lying to the eastward served by the plaintiffs' railway were (and in this case are) called "the group rates."

19. The defendants' colliery is the easternmost in the group, and the distance along the plaintiffs' line of railway, between the defendants' colliery and the member of the group furthest from the defendants' colliery, is fifteen miles.

20. The group rates comprised the rates from each of the said collieries to a great number of towns and places in various parts of England.

21. All coals going from any of the collieries comprised in the group to any of the last-mentioned towns and places must pass the defendants' colliery and go away thence in an easterly direction.

22. Before the 1st of January, 1880, and after the 4th of December, 1880, coal going away to the westward from any of the collieries comprised in the group was charged different rates, according to the distance from the colliery from which it was despatched to the place of destination. There was no "grouping" for traffic westward. The defendants' colliery, being the farthest to the eastward of the collieries in the South Yorkshire coalfield, paid the highest rates for coal going west, whilst they paid the same rates as the rest of the collieries in the group upon coals going east.

23. Between the 1st of January, 1880, and the 4th of December, 1880, the rates for carriage of coal westwards from any of the collieries comprised in the group were the same.

24. The bulk of the coals sent from the defendants' colliery have always gone eastwards, but they have also had a substantial traffic westwards.

25. On the 8th of June, 1880, the defendants applied to the Railway Commissioners to restrain the plaintiffs from charging the group rates.

26. On the 26th of July, 1880, the Railway Commissioners gave judgment in favour of the defendants, and prohibited the plaintiffs from charging at equal rates between the various collieries comprising the group and the places lying to the eastward to which the group rates applied. It is not disputed, for the purposes of this case, that the decision of the Railway Commissioners was right.

27. The plaintiffs have ceased to charge the group rates since the 26th of July, 1880, and have thenceforward carried coals from the various members of the group at differential rates. The rates thus established are, in respect of coal carried from the defendants' colliery, lower in every instance than the group rates.

28. The defendants have been charged the group rates down to the 26th of July, 1880.

29. For the purposes of this part of the case, it is to be assumed that the circumstances under which payments have been made do not preclude the defendants from opening the accounts.

30. The defendants contend that the group rates were a violation of section 90 of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), and of section 2 of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), and that they are entitled, under either of these enactments, to recover the difference between the amount actually paid by them for carriage of coals, and the amount which would have been payable if proper differential charges had been made for carriage of coal from the different members of the group; and not only such differences, but damages for breaches of the statutory duty.

31. The plaintiffs contest each of the above claims.

32. The questions for the opinion of the Court are:—

1. Did the group rates constitute a breach of the Railways Clauses Consolidation Act, 1845, s. 90?

2. If so, are the damages of the defendants for the breach of that enactment limited to the amount of overcharges (and what is the measure of such overcharges), or can general damages also be recovered?

3. Does an action lie for a breach of the Railway and Canal Traffic Act, 1854, s. 2?

4. If so, are the damages of the defendants for the breach of that enactment limited to the amount of overcharges (and what is the measure of such overcharges), or can general damages also be recovered?

The Queen's Bench Division gave judgment in favour of the railway company on the question of the power to bring an action for a breach of the Railway and Canal

Traffic Act, 1854, s. 2, and in favour of the colliery company on the other questions raised by the case.

Both parties appealed.

The Solicitor-General (*Sir F. Herschell, Q.C.*), *Littler, Q.C.*, and *C. A. Russell*, for the railway company.—The Queen's Bench Division gave judgment against the railway company on four points, and in favour of the railway company on one point, holding that an action does not lie for a breach of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 2 (1).

It is contended by the colliery company that, where a railway company carries goods to a certain terminus, it is bound to carry the goods of all persons of the same description carried to that terminus at differential rates corresponding to the number of miles traversed; but the contention on behalf of the railway company is, that section 90 of the Railways Clauses Act, 1845 (8 & 9 Vict. c. 20), only relates to goods or passengers carried over the same portion of the line of railway.

With regard to the first point, the allowance of 8*d.* per ton upon coals shipped by the Hamburg steamers, the allowance was made in respect of coal shipped on particular days by particular steamers; and it does not entitle the colliery company to a similar allowance on the coal carried for them over the whole period during certain days of which that allowance was made. There is nothing to shew that the coal shipped in these steamers was carried only over the same portion of the line as the Denaby Colliery coal.

With regard to the second question, the facts on which that arises shew that it comes within the principle laid down in the House of Lords in *Evershed* v. *The London and North Western Railway Company* (2), for there are dissimilar circumstances in relation to the carriage of the goods, so that 8 & 9 Vict. c. 20. s. 90 does not apply, unless the colliery company can shew that there was something more than the dissimilar circumstances warranted. When once a case is taken out of the section by proof that the circumstances are not the same, then the onus is shifted, and it is for the complainant to shew that the difference is unreasonable and illegal in some other way.

The third question depends upon the same principle. It is suggested that the allowances made in these two cases are contrary to the principle laid down in *Oxlade* v. *The North Eastern Railway Company* (3); but that case was decided on the Act of 1854, which speaks of undue preference quite apart from equality: so that the decision in that case is not an authority against the railway company in this case.

The facts on which the fourth question

(1) 17 & 18 Vict. c. 31. s. 2: "Every railway company, canal company, and railway and canal company shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles, and no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic in any respect whatsoever; nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. . . . ."

Section 3: "It shall be lawful for any company or person complaining against any such companies or company of anything done or of any omission made in violation or contravention of this Act to apply in a summary way, by motion or summons, in England to Her Majesty's Court of Common Pleas at Westminster, or in Ireland to any of her Majesty's superior Courts in Dublin, or in Scotland to the Court of Session in Scotland, as the case may be, or to any Judge of any such Court; and upon the certificate of her Majesty's Attorney-General in England or Ireland, or her Majesty's Lord Advocate in Scotland, of the Board of Trade alleging any such violation or contravention of this Act by any such companies or company, it shall also be lawful for the said Attorney-General or Lord Advocate to apply in like manner to any such Court or Judge, and in either of such cases it shall be lawful for such Court or Judge to hear and determine the matter of such complaint."

Section 6: "No proceeding shall be taken for any violation or contravention of the above enactment except in the matter herein provided; but nothing herein contained shall take away or diminish any rights, remedies, or privileges of any person or company against any railway or canal or railway and canal company under the existing law."

(2) 48 Law J. Rep. Q.B. 22; 47 ibid. Q.B. 284; 46 ibid. Q.B. 289; Law Rep. 3 App. Cas. 1029; ibid. 3 Q.B. D. 134; ibid. 3 Q.B. D. 254.

(3) 1 Com. B. Rep. N.S. 454; 26 Law J. Rep. C.P. 129.

arises shew that the transaction was *bona fide*, and not a transaction which comes within the mischief of 8 & 9 Vict. c. 20. s. 90.

The first question in Part II. of the Special Case raises the question of group rates. There was on this point an application to the Railway Commissioners, who held there had been undue preference under the Act of 1854, and the colliery company claimed compensation in respect of the time during which it was held there was undue preference; but there is no such right: the true remedy is given by 17 & 18 Vict. c. 31, which enables a complainant to get an injunction restraining for the future the undue preference. Unless this be the true construction of the Act of 1845, the Act of 1854 was not required; and section 6 of the Act of 1854 shews that that is the only remedy. *Nicholson* v. *The Great Western Railway Company* (4) establishes that a preference given, not for the purpose of benefiting one person to the disadvantage of another, but for the purpose of developing the railway, is not an undue preference within the Act of 1854; and if that fact had been found to exist in *Oxlade* v. *The North Eastern Railway Company* (3) the decision would have been different. *Cooper* v. *The London and South Western Railway Company* (5) and *In re The Caterham Railway Company* (6) were cited.

Webster, Q.C., Forbes, Q.C., and Lofthouse, for the colliery company.—The colliery company have two causes of complaint: the first is that although their coals were carried alongside the Hamburg ships, they were charged more than others; the second is that by a preference shewn to some one else they have been deprived of their market. With regard to the first question in Part I. the railway company gave no notice of the allowance, so that there was an improper charge within section 90 of the Act of 1845.

With regard to question 2, which relates to the land sales, no doubt, to make 8 & 9 Vict. c. 20. s. 90 apply, there must be the same circumstances in relation to the matter of carriage, but there must also be some relation in *quantum* between the allowance made and the extra services. *The Great Western Railway Company* v. *Sutton* (7) shews that a railway company are at liberty to increase their charges according to the increase of risk and the liability incurred; that decision involves therefore the question of *quantum*, but the company cannot make any difference between individuals. Lord Chelmsford held that the words "the same circumstances" in section 90 could not relate to anything else than the conveyance of goods; and Willes, J., clearly thought that there might be a differential rate of charge bearing proportion to the saving. It has been suggested that *Nicholson* v. *The Great Western Railway Company* (4) is an authority that if once the circumstances are different the *quantum* cannot be enquired into; but that argument is disposed of by the express words of Willes, J., in *Garton* v. *The Bristol and Exeter Railway Company* (8). Both these cases were under the Act of 1854, but they throw light on the construction of section 90 of the Act of 1845. *Evershed* v. *The London and North Western Railway Company* (2) is directly in point, for the different circumstances alleged to exist in this case are the same as the different circumstances alleged to exist in that case. The sufficient consideration for the reduction recognised in that case must involve the *quantum* of reduction as well as the circumstances of the reduction, and the case is an authority that an action can be brought for a breach of section 2 of the Act of 1854, although it does not seem that section 6 was referred to. The words "such toll" in section 90 of the Act of 1845 do not refer to passing only over the same portion of the line under the same circumstances, but the section assumes in the first instance that there is an equality of charge. The tolls cannot be reduced differentially when the circumstances are the same.

With regard to the group rates, it is suggested that because the coal passes the

(4) 5 Com. B. Rep. N.S. 366; 28 Law J. Rep. C.P. 89.

(5) 4 Com. B. Rep. N.S. 738; 27 Law J. Rep. C.P. 324.

(6) 1 Com. B. Rep. N.S. 410; 26 Law J. Rep. C.P. 161.

(7) 38 Law J. Rep. Exch. 177; Law Rep. 4 H.L. 226.

(8) 6 Com. B. Rep. N.S. 639; 28 Law J. Rep. C.P. 306.

Denaby Colliery and does not start from it, therefore there is no breach of section 90 by the railway company in charging coal which travels farther at the same rate as that from Denaby; but it is contended by the colliery company that if in respect of the same traffic the charges over the same portion of the line are in effect unequal, then there is a breach of section 90. For under the first part of the proviso in this section the charge for carriage must be the same, unless there are differences as regards the expense of carriage to the railway company; further, the charge must not be made different in favour of any particular person; and, lastly, the difference must not in fact favour any particular person, even though it is not intended to favour that person. There is no reason why an action should not lie for the breach of section 90. An action lies for a refusal to carry—*Crouch* v. *The Great Northern Railway Company* (9), *Parker* v. *The Great Western Railway Company* (10), *Edwards* v. *The Great Western Railway Company* (11), *Pickford* v. *The Grand Junction Railway Company* (12); and a refusal to carry except at an illegal or higher rate is in effect a refusal to carry. *In re The Lancashire and Yorkshire Railway Company* v. *Gidlow* (13), though decided on another section, contains the principle contended for. *Murray* v. *The Glasgow and South Western Railway Company* (14) may be relied on by the railway company, but in that case the only question was one of mileage rates. It is also said that section 6 of the Act of 1854 prevents an action from being brought; but the words "no proceeding shall be taken for any violation or contravention" point to proceedings in Chancery by injunction, or proceedings at the relation of the Attorney-General, and do not affect actions at law, for the words of section 6 are not sufficiently strong to prevent an action being brought. *Atkinson* v. *The Newcastle Waterworks Company* (15) and *The Guardians of The Holborn Union* v. *Shoreditch* (16) were cited.

Cur. adv. vult.

LINDLEY, L.J. (on December 1), delivered the judgment of the Court:—

With respect to 8 & 9 Vict. c. 20. s. 90, we are of opinion that the word "using" at the end of the section signifies using in any sense, and is not confined to using by sending engines and other carriages along the line. The section applies to all tolls without distinction, and, unless "using" includes using by sending goods, a distinction not warranted by the Act will be drawn between tolls for passengers and for engines and carriages on the one hand, and tolls for goods sent in the ordinary way on the other. The former kinds of tolls will be held to be within the last part of the section, and the latter kind not. This is opposed to the purpose and object of the enactment. The Court of Queen's Bench in *Evershed's Case* (2) came to the same conclusion as we do as to the meaning to be put upon the word in question, and we have not been able to find any case in which any other construction has been put upon it. Confining ourselves to goods sent by a railway, we therefore construe section 90 thus:—First, it empowers the company to vary its tolls within the limits set by its special Act; secondly, the tolls for the same classes of goods passing only over the same portion of the line, and under the like circumstances, must in all cases be equal; and, thirdly, there must be no reduction or advance in favour of or against any particular person. It becomes, however, necessary to consider the meaning of the following expressions—namely (*a*) "passing only over the same portion of the line"; (*b*) "under the like circumstances"; (*c*) "in favour of or against any particular person." (*a*) The expression "passing only over the same portion of the line" appears to us to mean passing between the same points of departure and arrival, and passing over no other part of the line. This interpretation is the natural interpretation of

(9) 9 Exch. Rep. 556; 11 ibid. 742; 21 Law J. Rep. Exch. 207.

(10) 11 Com. B. Rep. 545; 21 Law J. Rep. C.P. 57.

(11) 11 Com. B. Rep. 588; 21 Law J. Rep. C.P. 72.

(12) 8 Mee. & W. 372; 10 Law J. Rep. Exch. 342.

(13) 45 Law J. Rep. Exch. 625; Law Rep. 7 H.L. 517.

(14) 11 Court of Sess. Cas. 205.

(15) 46 Law J. Rep. Exch. 775; Law Rep. 2 Ex. D. 441.

(16) 46 Law J. Rep. M.C. 36; Law Rep. 2 Q.B.D. 145.

the words; it was adopted by the Lord Chancellor (Cranworth) in *Finnie* v. *The Glasgow Railway Company* (17), and by the Court of Session in the recent case of *Murray* v. *The Glasgow and South Western Railway Company* (14), and there is no decision in which any other interpretation has been put on the expression. If this be correct, it follows that the first part of the eprsecoviso intion 90 has no application to what are referred to in the Special Case as the grouped lines. The goods carried over them are not carried only over the same part of the line: they are carried over the same part, but also over other parts, and are not therefore within that proviso. (*b*) The expression "under the like circumstances" has been the subject of decision, and must now be taken to mean under like circumstances as regards the services performed by the railway company in receiving, carrying, and delivering the goods — see *The Great Western Railway Company* v. *Sutton* (7) and *The London and North Western Railway Company* v. *Evershed* (2). In the present case the railway company have infringed this provision of section 90 as regards the coal carried to Grimsby and shipped on the American steamers, and also as regards the coal carried to Grimsby and shipped to ports south of Harwich. The consequences of this infringement will be considered presently. (*c*) The expression "in favour of or against any particular person," at the end of section 90, remains to be considered. These words occur in a sentence which follows the early part of the proviso, and which is part of that proviso. The prohibition at the end of section 90 appears to us to do little more than throw light on what is meant by "same circumstances," and emphasise the earlier portion of the proviso. Both portions of it are confined to cases in which goods of a similar description are carried only between the same termini and under the same circumstances. We do not think that the prohibition extends to other goods not so carried. The prohibition is not an independent enactment applicable to goods not already provided for. If it were, the whole section would prescribe equality of the rate of toll in all cases; for tolls which can neither be reduced nor advanced in favour of or against any one must be at the same rate to all persons. But this equality of rate is expressly required for goods of the same sort carried only over the same portion of the line and under the same circumstances, and being expressly required for such goods similar equality can hardly have been intended for all goods. We come therefore to the conclusion that the equality clause and prohibition against favouritism contained in section 90 are both confined to the cases specified in the proviso, and that the prohibition against favouritism at the end of the section is not more extensive in its operation than the equality clause which immediately precedes it. This appears to be the view taken by Lord Blackburn in *Sutton's Case* (7), although it was not necessary to decide this point in that case. This view of section 90 no doubt very seriously limits its operation. But its failure to accomplish its supposed object is notorious, and that very circumstance led to the passing of the much more sweeping enactment contained in the Railway and Canal Traffic Act, 1854. The circumstances under which the railway company in this case charged Bannister and Josse & Co. less than other people in respect of coal for land sale and for returning their empty trucks are set out in the Case, and such circumstances are different from those under which the company charged other people more. We are therefore of opinion that the company have not contravened the provision of section 90 in these cases, and that they must be dealt with under the Railway and Canal Traffic Act of 1854. This Act is very differently worded from section 90 of the Railway Clauses Consolidation Act. The railway company may have infringed the provisions of section 2 of (17 & 18 Vict. c. 31) the Railway and Canal Traffic Act, 1854; but even if they have, no action lies for such infringement. Section 3 prescribes the remedy for infringements of the Act, and section 6 says that no other proceedings than those mentioned in the Act shall be taken against companies which violate it. The word "proceeding" in section 6 must include action. There might possibly be some doubt about this if the section did not go on to preserve all rights and reme-

(17) 2 Macq. H.L. 77.

dies against companies under the existing law; but the addition of these words removes all doubt on the subject. It is certainly true that in *Evershed's Case* (2) Lord Bramwell expressed an opinion that an action would lie for a violation of section 2 of the Act in question; but his attention was not drawn to section 6, and in *Evershed's Case* (2) there was a violation of section 90 of the Railways Clauses Consolidation Act, 1845, for which the action lay: so that it was immaterial to consider whether the action could have been maintained for a breach of section 2 of the Railway and Canal Traffic Act, 1854, alone. This point has recently been considered and decided in Scotland, and an action was held not to lie; and this view of section 6 was also that of the Divisional Court in this case, and is, in our opinion, correct. It is hardly necessary to add that, if the defendants cannot maintain an action for violation of the Act in question, they cannot maintain any set-off or counter-claim based on such a violation. It remains only to consider what damages, if any, the defendants have sustained by reason of the company's reduction of their tolls for the coal shipped at Grimsby for the American steamers and for ports south of Harwich. The defendants in fact sent no coals to Grimsby for such shipment, nor did they ever request the company to carry coals for such shipment. If they had, there is no reason to suppose they would have been charged more than Bannister. The complaint of the defendants is that the company prevented them from competing in trade with Bannister; but this is not made out. The railway company in no way prevented the defendants from obtaining orders from the Hamburg and American Shipping Company for South Yorkshire coal. Nor did the railway prevent the defendants from shipping coals to ports south of Harwich on the same terms as regards tolls as Bannister. The fact, however, remains that at various times the railway company did carry coals to Grimsby for the defendants and Bannister under the like circumstances as regards trouble and cost to the company, and did charge Bannister for some of such coals less than they charged the defendants; and if the defendants had shewn that they thereby sustained pecuniary loss, they would have been entitled to recover damages in respect thereof. The Divisional Court has held the defendants entitled to recover overcharges made to the defendants on the principle laid down in *Evershed's Case* (2)—that is, the charges made to them in excess of the charges made to Bannister for similar services. But the Court does not say on what quantity of coal, or on how much of the defendants' coal carried to Grimsby, this excess is to be calculated, and we are unable to see how the quantity is to be fixed. This difficulty did not arise in *Evershed's Case* (2), and the principle of that case seems to us inapplicable to the assessment of damages in this case. It cannot be right to calculate the amount of overcharge on all coal sent by the defendants to Grimsby without reference to the quantity on which or at the times during which a less rate was charged to Bannister; and, as already stated, we do not see on what principle to fix the amount of alleged overcharges. Under the peculiar circumstances of this case the defendants have not shewn any circumstances which will justify the Court in holding the railway company liable to them for any overcharges or damages. There is, therefore, nothing to be ascertained by the arbitrator on this head. The result therefore is that, on the facts stated in the Special Case, the plaintiffs are entitled to judgment on the set-off and counter-claim pleaded by the defendants. The costs of the action and reference will be disposed of by the arbitrator; but the railway company is entitled to the costs of the appeal.

Appeal of railway company allowed, appeal of colliery company dismissed

Solicitors—Cunliffes & Davenport, agents for R. Lingard-Monk, Manchester, for plaintiff railway company; Indermaur & Co., agents for Fisher, Doncaster, for defendant colliery company.

[IN THE COURT OF APPEAL.]

1884. Dec. 17, 18. } WELDON v. DE BATHE.*

Husband and Wife—House the Separate Property of Wife—Trespass—Power of Husband not living there to authorise Entry on—Married Women's Property Act, 1870 (33 & 34 *Vict. c.* 93), *ss.* 1, 11—*Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-s.* 2, *s.* 12.

A married woman, living apart from her husband in a house bought by her in 1871 *with money acquired by her through the exercise of her artistic skill within the meaning of* 33 & 34 *Vict. c.* 93. *s.* 1, *sued the defendant for trespass by entering the house in* 1878 *against her will and remaining there ten minutes, without doing any damage to the house. The defendant alleged that he entered the house by the authority and as the servant of the husband of the plaintiff:*—Held, *that the plaintiff was entitled to maintain the action without joining her husband as a plaintiff; that her husband, not living with her, could not authorise another person to enter against her will a house which, by* 33 & 34 *Vict. c.* 93. *s.* 1, *was to be deemed and be taken to be property settled to her separate use, and therefore that a trespass had been committed by the defendant, for that whether a husband can or cannot in such circumstances as existed in this case enter such a house himself against his wife's will, he cannot authorise other persons to enter for an object not connected with or incident to his desire to live in the house.*

Appeal by the plaintiff from the judgment of the Queen's Bench Division sustaining objections in law made by the defendant to the plaintiff's statement of claim.

The material parts of the pleadings were as follows:—

1. The plaintiff was on the 2nd of February, 1877, and for many years prior thereto residing at Tavistock House, Tavistock Square, in the county of Middlesex. The defendant had been for many years a personal intimate friend of the plaintiff.

2. On the 14th of April, 1878, and while the plaintiff was in sole possession of the said house, the defendant, in collusion with the plaintiff's husband William Henry Weldon, one Lyttleton Stewart Winslow, James Michael Winn, Edward Henry Rudderforth, Charles Edward Armand Semple, and James Neal, wrongfully entered the said house and remained therein some ten minutes, and thereby caused the plaintiff considerable disgrace, trouble, and annoyance.

3. Between the 2nd of February and the 19th of March, 1877, the defendant, in a conversation which he then had with the said William Henry Weldon, falsely and maliciously spoke and published of the plaintiff the words following—that is to say: "I (meaning the defendant) have been to see Georgina (meaning the plaintiff) at her urgent request, and I feel it my duty as a friend both of hers (meaning the plaintiff) and of yours (meaning the said William Henry Weldon), from what I (meaning the defendant) then saw and heard from her (meaning the plaintiff) own lips, to urge upon you (meaning the said William Henry Weldon) the advisability of your sending one or two first-rate doctors like Munro or Forbes Winslow to see her (meaning the plaintiff). For the impracticable projects that she (meaning the plaintiff) unfolded to me (meaning the defendant), which she felt so sure would succeed, the filthy state of the house, and the childish management of her means, all went to convince me (meaning the defendant) that for her (meaning the plaintiff) own sake, for yours (meaning the said William Henry Weldon), for that of her family, and for the sake of the poor little children she (meaning the plaintiff) is attempting to bring up, some opinion, at any rate, should be taken as to the state of her (meaning the plaintiff) mind."

7. In consequence of the slanderous words set forth in paragraph 3, of which the defendant is the sole originator, and which are wholly untrue, unjustifiable, false, and malicious, the plaintiff has suffered considerable annoyance, trouble, disgrace, and loss of friends, credit, and reputation, through the defendant having caused and made an irreparable breach between the plaintiff and her husband, so much so that the plaintiff's husband deprived and took

* *Coram* Brett, M.R., Cotton, L.J., and Lindley, L.J.

Weldon v. *De Bathe, App.*

from her her own house of the value of a large sum of money, to wit 300*l.* a year, and her annual income, to wit 500*l.*, also the plaintiff has suffered considerable grief, anguish of mind, loss of health, through the defendant, in collusion with the plaintiff's said husband, having grossly and maliciously deceived the plaintiff by attempting to fasten the initiative, the responsibility, and the odium of their improper conduct on the plaintiff's mother Louisa Frances Treherne, who was totally unaware of the step contemplated by the defendant—namely, that of incarcerating and confining the plaintiff in a lunatic asylum. Also the plaintiff has suffered considerable annoyance, vexation, and trouble from impertinent, calumnious, and mysterious remarks and innuendoes concerning her supposed strange conduct from divers persons during the year 1877.

The said plaintiff, in consequence of the above-mentioned slanders of the defendant, was, has been, and is shunned and avoided by her former friends, the society in which she previously moved, and prejudiced irretrievably in the eyes of the public.

The plaintiff claims 10,000*l.*

Defence—

1. The plaintiff on the 2nd of February, 1877, was and is still the wife of the said William Henry Weldon in the statement of claim mentioned, who is still living. The defendant will object that as the said supposed grievances respectively complained of were committed before the passing of the Married Women's Property Act, 1882, the right to any damages in respect thereof is vested in the said William Henry Weldon, and that the plaintiff is therefore not entitled to sue for them or to recover in this action.

2. The defendant denies that his alleged entry or continuance in the said house was wrongful; he also denies that he acted in collusion with the said persons or any of them, save as appears from the 4th paragraph hereof; and further says that he did what is complained of in the 2nd paragraph of the statement of claim by the leave and licence of the plaintiff.

3. The house in the said 2nd paragraph mentioned was not in the plaintiff's possession.

4. The said house, at the time referred to in the said 2nd paragraph, was the house of the plaintiff's husband the said William Henry Weldon, and was in his possession, and the defendant, as the servant of the said William Henry Weldon, and by his command, did what is complained of in the said 2nd paragraph.

5. The defendant referring to the 3rd paragraph of the statement of claim says that he did not speak or publish the said words.

8. The defendant will object that the words alleged in the said 3rd paragraph to have been spoken are not actionable, or at all events are not so without special damage, and that the damage alleged is not sufficient in law to sustain the alleged claim for slander.

The defence also contained paragraphs pleading the Statute of Limitations and privilege.

Reply—

1. The plaintiff joins issue upon the defendant's statement of defence, and the plaintiff says—

2. That in reply to the 3rd and 4th paragraphs of the defence, that the house in the 2nd paragraph of the statement of claim mentioned had been in her sole possession for three years, and was bought and paid for out of moneys earned by her in her profession of a musical composer and singer in the year 1871.

3. In reply to the 4th paragraph the plaintiff says that the defendant never was at any time the servant of the said William Henry Weldon.

6. There were also paragraphs alleging malice and special damage.

Rejoinder—

1. The defendant joins issue upon the plaintiff's reply.

2. The defendant will object that the facts stated in the 2nd paragraph of the reply are wholly immaterial and afford no answer to the 4th paragraph of the defence.

It was ordered that the points of law raised by the pleadings should be set down for hearing by the Court and disposed of before the trial of the issues of fact. The Queen's Bench Division gave judgment for the defendant both on the question of the trespass and on the ques-

tion of the slander, and ordered the paragraphs relating to those matters to be struck out.

The plaintiff appealed.

The plaintiff in person.

J. Digby, for the defendant.

[BRETT, M.R.—It appears from the statements in the pleadings, which must for the present be assumed to be true, that the contention of the plaintiff is that this house was bought with her own money—the produce of her industry—and therefore that it is, pursuant to the Act of 1870, to be deemed to be held and settled to her separate use; and that the Act of 1882 having come into force on the 1st of January, 1883, she is able to bring this action, which was, it appears, begun in September, 1883. Then *Weldon* v. *Winslow* (1) decides that the plaintiff can sue for a personal injury to herself although it was committed before the Act of 1882 came into force. With regard to the slander, the contention of the plaintiff would seem to be that the words are actionable in themselves; if not, that there is special damage which makes them actionable. Those are the points the defendant has to meet.]

It must be taken that this entry was authorised by the husband. Assuming that this house was bought by the plaintiff out of her earnings, and that it is to be deemed to be her separate property under 33 & 34 Vict. c. 93. s. 1 (2), still the legal estate will remain in the husband, for a married woman has not the absolute legal ownership of property settled to her separate use. If there are trustees of such property the legal estate is in them, and in such a case as this the legal estate is in the husband, who has the same property in it as if he were the usufructuary owner—*Lewin on Trusts* (7th ed. p. 203).

The husband cannot perhaps interfere with such property so as to injure it; but this action is not brought for injury to the house, but merely for entering it without the consent of the plaintiff. A husband can in circumstances such as those which exist in this case enter the house himself, he can send people to see his wife, can invite visitors to the house, can send in case of need medical attendants to visit her, and there is no right of action on her part unless some damage is done to the house or to the property in the house.

Hancocks v. *Lablache* (3), *Symonds* v. *Hallett* (4), *Howard* v. *The Bank of Eng-*

(1) 53 Law J. Rep. Q.B. 528; Law Rep. 13 Q.B. D. 784.

(2) 33 & 34 Vict. c. 93. s. 1: "The wages and earnings of any married woman acquired or gained by her after the passing of this Act in any employment, occupation, or trade in which she is engaged or which she carries on separately from her husband, and also any money or property so acquired by her through the exercise of any literary, artistic, or scientific skill, and all investments of such wages, earnings, money, or property, shall be deemed and be taken to be property held and settled to her separate use, independent of any husband to whom she may be married, and her receipts alone shall be a good discharge for such wages, earnings, money, and property."

Section 11: "A married woman may maintain an action in her own name for the recovery of any . . . property by this Act declared to be her separate property, . . . and she shall have in her own name the same remedies, both civil and criminal, against all persons whomsoever for the protection and security of such . . . . property, and of any chattels or other property purchased or obtained by means thereof for her own use as if such . . . . property belonged to her as an unmarried woman."

45 & 46 Vict. c. 75. s. 1, sub-s. 2: "A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued either in contract or in *tort* or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise."

Section 12: "Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies . . . . for the protection and security of her own separate property as if such property belonged to her as a *feme sole*. . . ."

(3) 47 Law J. Rep. C.P. 514; Law Rep. 3 C.P. D. 197.

(4) 53 Law J. Rep. Chanc. 60; Law Rep. 24 Ch. D. 346.

land (5), and *In re Poole* (6) were referred to.

The claim for slander should be struck out, for the words are not themselves actionable, and the alleged special damage is not the natural reasonable direct consequence of the words spoken—*Lynch* v. *Knight* (7) and *Chamberlain* v. *Boyd* (8).

Cur. adv. vult.

BRETT, M.R. (on Dec. 18).—The plaintiff has brought an action against the defendant for several alleged causes of action. One alleged cause of action is that the defendant spoke certain words which the plaintiff alleges are slanderous; a second alleged cause of action is that the defendant wrote a libel on her, but no question arises on this point on this appeal; the third alleged cause of action is that the defendant entered a house solely occupied by and in the sole possession of the plaintiff, against her will. An objection equivalent to a demurrer has been taken to two of these alleged causes of action. With regard to the alleged slander, it is, I think, clear that the plaintiff cannot maintain any action; the words do not impute a criminal offence, they do not fall within the recognised classes of words actionable in themselves, and there is no damage which satisfies the definition of that special damage which is required by the law to support an action. Mere injury to the feelings of the plaintiff is not such special damage, and cannot make words not otherwise actionable the subject of an action. Moreover, the special damage alleged must be the natural and not unreasonable result of the words spoken, so that the consequences suggested must flow naturally and not remotely from the words spoken; and the injury alleged in this case does not flow in such a manner from the words spoken, so that there is no special damage which comes within the rule of law as to such damage.

(5) 44 Law J. Rep. Chanc. 329; Law Rep. 19 Eq. 295.

(6) 46 Law J. Rep. Chanc. 803; Law Rep. 6 Ch. D. 739.

(7) 9 H.L. Cas. 577.

(8) 52 Law J. Rep. Q.B. 277; Law Rep. 11 Q.B. D. 407.

The most important point raised on this appeal is the question of the alleged trespass. The allegation is that the defendant entered the house of the plaintiff against her will; it is not alleged that he did any damage. Still it is certain that if a person does enter another person's house against that person's will, there is in law a trespass. But the plaintiff is a married woman, and the defendant alleges that he entered this house by the authority of her husband. For this house was, it is argued, the property of the husband of the plaintiff; that is, the legal property in the house was, as is said, in the husband, so that he himself was entitled to enter therein when he willed, and, further, that he was entitled to authorise other persons to enter therein. If this be correct, I confess it seems to me the statutes relating to married women's property would be on this point of little effect, and they would by a judgment to this effect be in fact frittered away. The statutes were passed to protect married women—mainly, no doubt, against ill-conducted husbands, but still to protect the property of married women generally. The Act of 1870 (33 & 34 Vict. c. 93) provided in section 1 that "the wages and earnings of any married woman acquired or gained by her after the passing of this Act in any employment, occupation, or trade in which she is engaged, or which she carries on separately from her husband, and also any money or property so acquired by her through the exercise of any literary, artistic, or scientific skill, and all investments of such wages, earnings, money, or property, shall be deemed and taken to be property held and settled to her separate use, independent of any husband to whom she may be married, and her receipts alone shall be a good discharge for such wages, earnings, money, and property." So that property bought by her pursuant to that section is her property as against her husband. In this case this house was—as far as appears from the pleadings, for the facts have not yet been tried—bought by the plaintiff with money acquired by her from her own industry and earnings, so that it is, pursuant to that section, to be "deemed and taken to be property held and settled to her separate use indepen-

dent of any husband." I doubt whether in such a case a married woman has only the mere rights which formerly a married woman had over property settled to her separate use; but, not deciding that question, I am of opinion that if a married woman is in sole occupation, as this plaintiff was, of a house bought as this house was, and if her husband is not living there, she could under the Act of 1870 bring an action for a trespass to her house committed by a stranger. The Act of 1882 (45 & 46 Vict. c. 75), however, goes farther, and enables a married woman to maintain an action without her husband. This Court has already held in *Weldon* v. *Winslow* (1) that the result of the Act of 1882 is to give the married woman a right of action for wrongful acts done before that Act was passed—that is, for acts done against rights given to her by the Act of 1870. The defendant states that he entered this house by the authority of the husband of the plaintiff. Can the husband himself, in such circumstances as here exist, enter such a house against the will of the wife? It is said that he can do so by virtue of his marital right. I give no opinion on this question. It is not necessary to decide it now, and I decline to do so; but I think that in the case of an ill-conducted husband the argument would have a startling effect, and would produce consequences not other than alarming. Assuming, however, that the husband can do so, I am clear that the effect of the Acts of 1870 and 1882 is that the husband cannot delegate his right to any one else. If, therefore, it is made out by evidence on the trial of the case that this house was bought with money the produce of the earnings and industry of the plaintiff, it must be held as a matter of law that the husband could not authorise any one to enter that house against the will of the plaintiff as this defendant did: so that the part of the statement of claim relating to this cause of action must be restored. The plaintiff, therefore, has succeeded on one ground of appeal and failed on the other; but as the ground on which the plaintiff has succeeded seems to be the important one, the plaintiff will have the costs of the appeal.

COTTON, L.J. — I am of the same opinion. Two points have been raised on this appeal. With regard to one point, that relating to the slander, I agree with the judgment of the Master of the Rolls and with the Queen's Bench Division, and I think that the law is well known and established.

The second point raises in fact two questions. One is whether the plaintiff can sue alone; and the other is, does the statement of defence set up a defence which can be sustained in law? I think that the plaintiff can sue alone. This house, taking the statements in the pleadings, is a house bought by the plaintiff, a married woman, out of her own earnings; and that brings us to the consideration of section 1 of the Act of 1870 (33 & 34 Vict. c. 93). That section makes property so acquired the separate property of the plaintiff, for the section says that property acquired by a married woman through her own exertions and the investments of money or property so acquired shall be deemed and be taken to be property held and settled to her separate use, and the effect of that Act is that such property stands in the same position as if it had been settled to her separate use by an ordinary settlement or other instrument. I do not myself doubt that a married woman could before 1882 maintain an action for the protection and security of property so held, for the provisions of section 11 of the Act of 1870 seem to me to be express upon that point; but even if that were not so, still section 12 of the Act of 1882 (45 & 46 Vict. c. 75) enables her to do so, for that section gives every married woman "in her own name against all persons whomsoever, including her husband, the same civil remedies . . . for the protection and security of her own separate property as if such property belonged to her as a *feme sole*." It is suggested that this action is not an action brought for the protection of such separate property; but it appears to me to be essentially an action brought for the protection of the house of the plaintiff, which is for the purpose of the present argument to be considered her separate property. It has already been decided in *Weldon* v. *Winslow* (1) that a married woman can sue alone for a *tort* done before

the Act of 1882 came into operation. The right to sue may be regulated by the provisions of the Act of 1882; but the question whether the Act in respect of which the action was brought is wrongful, depends upon the Act of 1870, and, assuming the facts stated in these pleadings to be true, this house was the separate property of the plaintiff within the meaning of that Act. It is not necessary now to decide whether a husband has a right to enter such a house in circumstances such as exist in the present case; but I do not differ from the opinion expressed in the Divisional Court, nor do I desire to depart from the opinion expressed by myself in *Symonds* v. *Hallett* (4); but, assuming that a husband has, in consequence of there being no judicial separation, a right to go to the house for the purpose of being with his wife, still the question here is whether he can authorise other persons to enter that house against the will of the married woman. According to the statements contained in these pleadings, the defendant did not enter this house for any purpose connected with or incident to any desire of the husband to live with his wife in this house; and I am of opinion that a husband cannot, by virtue of any power that he may have of living with his wife in such a house, authorise another person to enter that house, not for the purpose of assisting the husband in any desire to live with the wife in the house, but, as in this case, for quite another purpose and with quite a different object. There was here, therefore, an act done by the defendant which was under the Act of 1870 a wrongful act, and the plaintiff has a right to bring an action in respect of the trespass by the defendant. I give no opinion as to how far a wife could be heard to say that if the husband was living with her in such a house the entry by some one authorised by him was not incidental to the husband's living there. If the husband is living there, then I think her separate property and her rights may be burdened by that fact to some extent.

LINDLEY, L.J. — With regard to the slander alleged by the plaintiff, I do not think it is necessary to add anything. The question of trespass is more complicated. Looking at the pleadings, we find that the plaintiff, a married woman, states that she was solely in possession of a house bought by her out of her separate earnings, which was her separate property under the Act of 1870; that in 1878 the defendant entered this house wrongfully and against her will. It is, I think, clear that the plaintiff can sue alone if a wrong has been committed, and the decision in *Weldon* v. *Winslow* (1) shews that she can under the Act of 1882 bring an action for a wrong committed before the Act of 1882. The defendant says that he entered by the authority of the husband; but this case does not raise the question whether a married woman, living as this plaintiff is living, can keep her husband out of such a house as this, or whether, if he is living with her in such a house as this, he can invite visitors into the house: and I express no opinion on that question, for in this case the married woman, the plaintiff, was living without her husband in a house which, as appears from the statements in the pleadings, was her separate property, and in these circumstances the husband authorised the defendant to enter the house against the will of the plaintiff. The right of the plaintiff is, in the circumstances of the case, an exclusive right except as against her husband, and he cannot authorise other persons to enter without her consent. She was solely in possession of this house, and he was not living in the house, so that I agree that the part of the claim which relates to this cause of action must be restored.

Judgment accordingly.

Solicitors—Maples & Teesdale, for defendant.

[IN THE COURT OF APPEAL.]

1884. Nov. 28, 29. } BOOTH *v.* SMITH.*

Annuity—Rent-charge—Release of Part of Land charged—Lord St. Leonards' Act (22 & 23 Vict. c. 35), s. 10.

Where, on the conveyance of land which is subject to a rent-charge, the land conveyed is released from the rent-charge, the previous purchaser of other part of the land charged, not having obtained a release of that part, but not having concurred in the release of the other part, is, by the effect of Lord St. Leonards' Act, s. 10, liable to pay to the holder of the rent-charge a part of the rent-charge proportionate to his share of the land charged.

Appeal of the plaintiff from the judgment of Stephen, J., reported 53 Law J. Rep. Q.B. 425.

The action was commenced on the 7th of May, 1883, to recover arrears of an annuity of 20*l.* per annum for five years.

In March, 1875, Frederick Griffiths died, having by his will devised in fee to his son William Griffiths his copyhold house, shop, and premises at Epping, together with the garden and stabling, and also certain personal property, subject to an annuity of 20*l.* to his daughter, the plaintiff, for her life. On the 24th of July, 1876, William Griffiths contracted to sell a part of the property so devised to him to the defendant for the sum of 80*l.* The purchase-money was paid and the defendant let into possession on the same day. On the 31st of July, 1876, William Griffiths surrendered the remainder of the property so devised to George Wright for the sum of 350*l.*, and by a contemporaneous deed the plaintiff released the part of the property so conveyed to Wright from the annuity.

Barber, Q.C., and *J. Cutler*, for the plaintiff.—The action brought is the action of debt now substituted for the real action of annuity, which lies at the suit of the annuitant against the terre-tenant of the land upon which the annuity is charged—*Thomas* v. *Sylvester* (1). At common law the release of part of the land subject to the rent-charge operated as a release of the whole; but by section 10 of Lord St. Leonards' Act (22 & 23 Vict. c. 35) it was provided that "the release from a rent-charge of part of the hereditaments charged therewith shall not extinguish the whole rent-charge, but shall operate only to bar the right to recover any part of the rent-charge out of the hereditaments released, without prejudice, nevertheless, to the rights of all persons interested in the hereditaments remaining unreleased and not concurring in or confirming the release." We contend, first, that we are entitled to the whole rent-charge from the defendant, leaving him to obtain contribution from the person liable with him in respect of the annuity—that is to say, the purchaser of the other part of the land; or, in the alternative, we claim a part of the rent-charge according to the proportion which the defendant's land bears to the whole land charged. The second of these seems the better construction, as the Act probably intended to distribute the whole rent-charge rateably over the whole land, and not, as before, to consider all the rent-charge impressed on every part of the land. If the words "without prejudice, &c." include the case of the defendant, the section is nugatory.

J. G. Witt (*Gilbert Metcalfe* with him), for the defendant.—The defendant's case comes within the proviso at the end of the section beginning "without prejudice." He is a person interested in the hereditaments remaining unreleased and not concurring in or confirming the same. His common law right is, therefore, not affected by the section. This construction does not make the section inoperative, because if the vendor had retained the defendant's land instead of selling it to the defendant, the vendor would still be liable for the whole rent-charge, although the land first sold would be discharged from it. As to the form of the action in *Thomas* v. *Sylvester* (1), the annuity was granted by deed, and there is no case reported in which an action of debt has been held to lie in favour of an annuitant under a will. Neither is this a legal rent-charge, for it is charged on copyholds and on personalty, so that an action as for a legal debt will not lie.

[COTTON, L.J.—If there is that dis-

* *Coram* Brett, M.R., Cotton, L.J., and Lindley, L.J.

(1) 42 Law J. Rep. Q.B. 237; Law Rep. 8 Q.B. 368.

tinction we can grant another remedy by appointing a receiver.]

In any case, the defendant is liable only for a proportionate part. The section says that the release of part shall not extinguish the whole, implying that it shall extinguish a part.

BRETT, M.R.—The plaintiff in this case has an annuity which was a rent-charge of 20*l.* charged on certain property. The owner of the property has parted with the whole, at different times and to different persons. When Wright purchased, the owner of the rent-charge released that portion of the property then sold. The owner sold the rest to Smith, but the plaintiff was not a party to that transaction and did not release the rent-charge. Can the plaintiff sue the owner of the unreleased part? It is said that the form of action was wrong, but when we asked the defendant's counsel whether he preferred a receiver he declined it. If the rent-charge can be recovered at all, I think it can be recovered by action of debt. But what is the effect of section 10 of 22 & 23 Vict. c. 35 in these circumstances? What is its effect in other circumstances? The owner may sell a portion of the property which is in his possession so as to get rid of the rent-charge as to that part, keeping the remainder in his own hands. In this case he gets rid of the whole of his land, and it is said that the whole rent-charge is payable out of the unreleased part.

The section says that the release of part shall not extinguish the "whole" rent-charge, and shall operate only to release the part released, without prejudice to rights in the unreleased part in the hands of those not concurring in the release. The owner who obtains the release of part is still bound to pay the whole annuity out of the part unreleased, because he concurs in the release. The defendant, however, is a "person interested in the hereditaments remaining unreleased and not concurring in or confirming the release." His rights are not to be prejudiced. What is the meaning of "his rights"? It means that his real substantial rights existing before the statute are reserved. What are those rights? If he had paid the whole rent-charge, he could have called for contribution on the other persons liable. His substantial rights are that he shall be left to pay only his proportion. I think that the defendant is only liable to pay such a proportion as is represented by the land which is his. If you take the prices given as the test, his proportion is as nearly as possible 4*l.* a year. The judgment ought therefore to stand for 20*l.*, subject to the parties having an enquiry as to value if they wish.

COTTON, L.J.—Under the old law the effect of a release of a rent-charge over part of the land was clear. The whole rent-charge was gone, and the inconvenience was great. Even if the owner used words which operated as a new grant on the land unreleased, mesne incumbrances might be let in. But by the Act the release of a part is not to extinguish the whole rent-charge. That does away with the old law. Such a release, it is added, is to operate only to bar the right in respect of the part released. So far the section only contemplates the case of a person retaining the estate but releasing part of it. There is no reason why he should be relieved of the rent-charge because he has obtained an extra price for the part sold. The same effect happens when he is not the owner, but when all who are owners concur in the release. Then comes the proviso that the release shall be without prejudice to the rights of those interested who do not concur. The defendant did not concur, and the Judge below held that the effect was the same as if the Act had not been passed. There was a discharge *in toto*. In my opinion this was a wrong construction of the Act. The rights referred to are rights consistent with the previous part of the section. It is said for the appellant that the proviso only saves the right of contribution against persons releasing. This construction is, however, perilously near the construction adopted in the Court below. It was meant, in my opinion, that each person shall not bear more than his proportion. The "right" of the owner in the part not released is not to bear more than his proportion. Before the Act he might have had contribution; since the Act he is to be in the same position as if he had obtained contribution.

That appears to me to be the reasonable construction of the Act.

LINDLEY, L.J.—The section is a little obscure. The first thing to look at is the object of the whole section. It was to put an end to the old strange law that you could not release a part of land from a rent-charge without releasing the whole. It was a technicality, and it was desirable to alter it. But it was not desirable to say that the annuity shall be apportioned, because it is often convenient to throw the annuity on the rest of the land. Nor was it desirable to release the whole land without considering the rights of other portions not released. When these persons concur in the release, the rent-charge issues out of the part unreleased. The section is obscure as to what happens when they do not. In that case there is an apportionment. If that is not the true construction we are put to this dilemma—either the section has not application to the case, or the circuity remains. The construction we adopt is, I think, consistent with the real object of the whole section (2).

Appeal allowed.

Solicitors — Tippetts & Son, agents for C. Chambers, Hastings, for plaintiff; Tamplin, Tayler & Joseph, for de endant.

1884. Dec. 5. THE METROPOLITAN BOARD OF WORKS *v.* ANTHONY AND CO.

Metropolitan Management Act, 1882—*Erection of Temporary Wooden Structure—Continuing Offence—Complaint—Time*—45 *Vict. c.* 14. *s.* 13—11 *& 12 Vict. c.* 43.

[For the report of the above case, see 54 Law J. Rep. M.C. 39.]

(2) The judgment was for 18*l.* 15*s.*, but the Court ordered the defendant to pay all the costs of the action on the High Court scale, deeming it a proper action to be brought.

1884. Nov. 27. SMITH *v.* DART AND SONS.

Ship and Shipping—Charter-party—Arrival at loading-place by a certain date—Condition precedent—"Excepted perils"—Misdirection.

By a charter-party it was agreed that a steamer should proceed to three safe loading places between C. and M. as ordered, and proceed with cargo to H. or L. (dangers and accidents of the seas excepted). Then followed this proviso—"Should the steamer not be arrived at first loading port free of pratique and ready to load on or before a certain day, charterers have the option of cancelling or confirming this charter-party." The vessel arrived off the first loading port two days before the day named, but the sea and weather prevented any communication with the shore, and she was unable to get pratique on the day named in the charter-party, but was compelled by stress of weather to put into V., where the charterers' agent cancelled the charter-party:—Held, *that the arrival of the steamer at the first loading place free of pratique by the day named was a condition precedent, the non-fulfilment of which entitled the charterers to exercise the option of cancelling the charter-party; and that the clause excepting dangers and accidents of the seas applied only to the voyage.* Held further, *that it is not misdirection for the Judge to tell the jury his own opinion on the issue before them.*

This was a motion to enter judgment for the defendant upon the finding of the jury, and also for a new trial on the ground of misdirection.

By a charter-party, dated the 14th of November, 1881, it was agreed that the steamship *Spark* should proceed to three safe loading places between Castellon and Malaga, as ordered after arrival in Spain, and there load 7,000 cases of oranges and proceed to London and or Hull, and deliver the same agreeably to bills of lading (the act of God, the Queen's enemies, restraints of princes and rulers, pirates, civil commotion, riots, strikes, fires, frosts, floods, and all other dangers and accidents of the seas, rivers, and steam navigation of what nature and kind soever during the said

voyage always mutually excepted). It was also provided that "should the steamer not be arrived at first loading port, free of pratique, and ready to load on or before the 15th of December then next, charterers had the option of cancelling or confirming the charter-party." The *Spark* proceeded to Carthagena in Spain, and on the 11th of December was ordered to Burriana to load, where she arrived on the 13th of December, 1881, but owing to the state of the sea and weather it was impossible to hold communication with the shore, and she was not free of pratique on or before the 15th of December, 1881. On that day she was compelled by stress of weather to quit Burriana and put in at Valencia, and the defendants' agent there cancelled the charter-party, and refused to load according to it. After such cancelling, however, the captain took on board at various places, but not under the said charter-party, 4,972 cases of oranges in all, supplied by the agents of the charterers, which were carried to Hull and delivered. The plaintiffs brought an action against the charterers for breach of the contract to load, and at the trial before Hawkins, J., the jury found that Burriana was a safe loading-place, but that it was solely by stress of weather that the *Spark* had not got pratique on the 15th of December. Judgment was entered for the defendants.

C. Hall, Q.C., and *J. G. Witt*, for the plaintiffs.—The learned Judge misdirected the jury. In the first instance his Lordship summed up in a way to which the plaintiffs can take no exception, but on the jury returning into Court after an absence of two hours, his Lordship in effect told the jury that in his opinion Burriana was a safe loading-place. The witnesses on each side did not disagree as to the facts concerning Burriana, but the dispute was as to the true inference to be drawn from these facts, and this was peculiarly for the jury. The learned Judge in effect withdrew the determination of the issue from the jury, by telling them his opinion on it.

Secondly, the steamer was prevented by stress of weather from entering the port of Burriana free of pratique on or before the 15th of December, and the clause giving an option of cancelling did not apply, as dangers and accidents of the sea are specially excepted in the charter-party—*Barker* v. *McAndrew* (1) and *Harrison* v. *Garthorne* (2).

Finlay, Q.C., and *A. E. Nelson*, for the defendants, were stopped on the question of misdirection.—The arrival of the steamer free of pratique on or before the 15th of December, 1881, was a condition precedent to loading. The exception as to dangers of the seas applied only to the voyage. It is not contended that her non-arrival would give the defendants a right of action for breach of contract, but that if she did not arrive by the time specified, the defendants, by the terms of the charter-party, were entitled to cancel it. The clause giving them this option is perfectly unqualified, and is not subject to the exceptions as to dangers and accidents of the seas—*Crookewit* v. *Fletcher* (3).

LORD COLERIDGE, C.J.—In this case two points were taken in support of the motion for a new trial. First, that the learned Judge at the trial, after having summed up to the jury in a manner to which no exception has been or, in my judgment, could be taken, when asked some further questions by the jury, expressed it as his opinion that the port of Burriana was a "safe port" within the meaning of the charter-party. But the learned Judge took care to remind them that that question was for them, and I do not think such expression of his opinion amounted in any degree to a misdirection. The second point made was that a date was fixed by the charter-party on which the vessel was to arrive free of pratique at a "safe port" to be named by the charterers, and that if the vessel did not arrive by that date the charterers should be at liberty to cancel the charter-party. As a matter of fact she was not free of pratique by the date stipulated, because on her arrival at the port of loading the weather and sea prevented any communication with the shore; but it was contended that her non-arrival

(1) 18 Com. B. Rep. N.S. 759; 34 Law J. Rep. C.P. 191.
(2) 26 L.T. N.S. 503; 20 W.R. 772.
(3) 1 Hurl. & N. 893; 26 Law J. Rep. Exch. 153.

was due to the bad state of the weather, and that the clause excepting "dangers and accidents of the sea" applied to the whole charter-party, and that the vessel having by stress of weather been prevented from reaching the port, the charterers were not entitled to cancel the charter-party. I have come to the conclusion, however, that the arrival of the ship by the time specified was a condition precedent to the charterers' not exercising the option given by the charter-party; and that the clause providing for that overrides the whole charter-party, including the clause as to dangers and accidents of the sea; and as the vessel did not arrive at the time specified, that condition precedent had not been fulfilled, and the charterers were at liberty to cancel the charter-party. I therefore think there should be no new trial.

MATHEW, J.—I am of the same opinion. As to the first point there was clearly no misdirection, the learned Judge having only told the jury that if the place could by reasonable precaution be made a "safe port," then it would be a "safe port" within the meaning of the charter-party. As to the second point, I have come to the conclusion, after consideration, that the clause as to dangers and accidents of the seas does not apply to the clause providing for the arrival of the ship at a given date at a port to be specified by the charterers. That would be to read the clause as if it were "free of pratique and ready to load on or before the 15th of December next, unless prevented by dangers and accidents of the sea." But it might be most important to fix a day for the ship to arrive at the port of loading, and quite reasonable that the charterers should insist on her arriving on or before a particular date. Nor is it unreasonable to suppose that a shipowner might enter into such a contract, thinking that the ship might be reasonably expected to arrive by the date specified. In this case the vessel did not arrive in the sense intended by the condition, and the charterers, as in my judgment they were entitled to do, exercised their option of cancelling the charter-party. I therefore think there should be no new trial.

SMITH, J.—I am of the same opinion. The second point is important, and raises the question whether in such a charter-party as this, the usual clause as to dangers and accidents of the seas inserted therein applies to the whole charter-party or only to the voyage from the port of loading. In my judgment the clause as to dangers and accidents of the seas is put in in favour of the ship, but that giving the option of cancelling is in favour of the charterers. Why should the latter not stipulate that the ship is to be at the port of loading on a fixed date, and that if it be not there, no matter what the cause, he will not carry out the charter-party; and why should not the shipowner say, "If the ship is not there, you shall have an option of cancelling the charter-party"? That appears to me reasonable, and therefore I think the clause as to dangers and accidents of the sea applies only to the voyage from the port of loading, and this motion must be refused, with costs.

Motion refused, with costs.

Solicitors—Pritchard & Sons, agents for A. M. Jackson, Hull, for plaintiffs; Lowless, Nelson & Co., for defendants.

[IN THE QUEEN'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

1884. June 10, 11, 12. Dec. 11, 12. THE IMPROVEMENT COMMISSIONERS FOR THE DISTRICT OF NEWTON-IN-MAKERFIELD *v.* THE JUSTICES OF THE PEACE FOR THE COUNTY PALATINE OF LANCASTER.

Highway—Turnpike Road—Expiration of Trust—Part of Road within Local District—Liability to contribute to repair—Highways and Locomotives (Amendment) Act, 1878 (41 & 42 *Vict. c.* 77), *s.* 13—*Turnpike Road.*

[For the report of the above case, see 54 Law J. Rep. M.C. 1.]

1884. Dec. 8, 15. THE QUEEN (*on the prosecution of the Great Northern Railway Company*) *v.* THE OVERSEERS OF LANGRIVILLE.

Poor—Rate—Appeal against Rate, Condition Precedent to — Notice of Objection to Assessment Committee—Power of Assessment Committee to amend Valuation List —Union Assessment Committee Acts, 25 & 26 *Vict. c.* 103, *ss.* 18, 19, *and* 42; *and* 27 & 28 *Vict. c.* 39. *s.* 1.

The "notice" mentioned in section 1 *of* 27 & 28 *Vict. c.* 39, *the giving of which is a condition precedent to the power of the assessment committee to hear an objection to the valuation list and amend such list, means only the notice to be given by the objecting party to the committee, to be served in the manner prescribed by section* 42 *of* 25 & 26 *Vict. c.* 103.

Where, therefore, an assessment committee, having had due notice of objection to the valuation list from a railway company in respect of their assessment in a parish in the union, held a meeting to hear such objection without giving notice thereof to the overseers, and having amended the list to the satisfaction of the company, then gave notice to the overseers to amend their current rate accordingly,—Held, *that the assessment committee had acted within their powers, and that the overseers were bound to amend their rate in accordance with the amended list, and could not refuse to do so on the ground of not having had notice of the meeting of the assessment committee.*

In this case a rule *nisi* for a *mandamus* had been obtained calling on the overseers of the parish of Langriville to amend their current rate in accordance with an amendment made by the assessment committee in the valuation list.

The facts were that the Great Northern Railway Company were dissatisfied with the assessment of that portion of their line which runs through the parish in question, and, with a view to being enabled to appeal to the Quarter Sessions should they not obtain such relief as they might think just from the assessment committee, gave due notice of their objection to the valuation list to the assessment committee and to the overseers of the parish. The assessment committee held a meeting, heard the objection, and decided to reduce the amount to a figure which satisfied the company; and having amended the valuation list accordingly, sent notice of such amendment to the overseers of the parish. These last, however, declined to amend their rate, as not having received notice of the meeting of the assessment committee at which the objection was considered; and this rule was to compel them to amend.

W. Graham shewed cause.—The question is, whether the assessment committee has any power to deal with objections and alter the list behind the backs of the overseers, and without giving the notice prescribed by section 19 of the Union Assessment Committee Act, 1862. When the valuation list has been made, signed, and deposited, it can only be altered in accordance with the powers given in the Act. Section 18 enables a person aggrieved to give notice of objection to it, which he must give to the committee and to the overseers; and then section 19 prescribes the terms on which the committee are empowered to hear objections—namely, giving twenty-eight days' notice to the overseers. Then the Amendment Act of 1864, in section 1, provides that where a person intends to appeal to Quarter Sessions he must give notice of his objection to the assessment committee, which objection, after notice given at any time in the manner prescribed by the Act of 1862 with respect to objections, the committee shall hear, with full power to call for and amend such list. Therefore the notice prescribed in section 19 of the previous Act—namely, to the overseers—is a condition precedent to the committee having any power to hear the objection or amend.

Dugdale, Q.C., and *C. Dodd*, in support of the rule.—The overseers cannot go behind the order of the assessment committee reducing the rate. Unless that be brought up by *certiorari* and quashed, they must obey it.

Secondly, there is no necessity for all the notices under the Act of 1862 to be given when the committee are to hear an objection by a person about to appeal—

The Queen v. *Edmonds* (1). Even if it were the duty of the committee to give the notice to the overseers, the company are not in fault, and ought not to suffer. They may assume that everything is rightly done to enable the committee to hold the meeting. If their rights depended on the committee doing their duty, they could never be sure of being able to appeal. It was never intended that an aggrieved person, who is required to go first before the assessment committee, should be prevented from going to Quarter Sessions by some neglect of the committee: and yet this would be the effect of the construction contended for by the overseers. Therefore it is submitted that "notice" in section 1 only means notice to be given by the person aggrieved.

Cur. adv. vult.

The judgment of the Court (Hawkins, J., and Smith, J.) was now delivered (Dec. 15) by

SMITH, J. — This was a rule calling upon the overseers of Langriville to shew cause why a *mandamus* should not issue commanding them to alter the rate as it stood in accordance with the amendment of the assessment committee. The point raised in the case is a short one. It is, what is the meaning to be put upon the words "after notice given at any time in the manner prescribed by the said Act with respect to objections," in section 1 of the Union Assessment Committee Amendment Act, 1864 (27 & 28 Vict. c. 39).

On the part of the overseers it is contended that the notice therein mentioned means not only the notice to be given by any overseer or any person aggrieved by a valuation list to the committee, as is prescribed by section 18 of the Union Assessment Committee Act, 1862 (25 & 26 Vict. c. 103), but also the notice to be given by the committee to the overseers of the meeting they are about to hold to hear objections, as is prescribed by section 19 of the said Act.

On the other side it is contended that the notice referred to in section 1 of the Act of 1864 at the most only means the notice to be given by the objector of his objection, as is prescribed by section 18 of the Act of 1862.

The facts are shortly as follows:—

The Great Northern Railway Company's line runs through the parish of Langriville. The committee assessed the portion of the company's line which ran through that parish. The company were dissatisfied, and proposed appealing to the Quarter Sessions, but before doing so had to comply with the requirements of section 1 of the Union Assessment Committee Amendment Act, 1864 (27 & 28 Vict. c. 39). The company duly gave notice to the committee of their objection against the valuation list. No notice was given as is prescribed by section 19 of the Act of 1862. The committee, having heard the company, determined to amend the list, and having done so gave notice of the amendment to the overseers of the parish of Langriville to alter the rate as it then stood.

This the overseers refused to do, alleging, as is the fact, that they had received no notice of the meeting of the committee, as is provided by section 19 of the Act of 1862.

We are of opinion that there was no necessity to give this notice, and that this section does not apply to the case now in hand.

In our judgment the words in section 1 of the Act of 1864—"after notice given"—apply solely to the notice to be given by the objecting party to the committee.

If the construction of the overseers is correct, we must read the words thus—"after notices given"—which we have no warrant for doing, so as to bring in the notice prescribed by section 19 of the Act of 1862 as well as the notice prescribed by section 18 of the same Act. In the face of the words of the statute we do not feel ourselves at liberty to enquire as to what was or was not the intention of the Legislature in the year 1864, which we were strenuously invited to do by Mr. Graham. It seems to us that the case of *The Queen* v. *Edmonds* (1) goes to shew that at any rate all the requirements of the Act of 1862 do not apply to a rehearing by the committee of an objection by an objector before he proceeds to Quarter

(1) 43 Law J. Rep. M.C. 156; Law Rep. 9 Q.B. 598.

The Queen v. *Overseers of Langriville.*

Sessions; and we are of opinion that the committee are entitled to hear his objection notwithstanding that the notice prescribed by section 19 of the Act of 1862 has not been given.

It seems to us also that the words in section 1 of the Act of 1864—"after notice given at any time in the manner prescribed by the said Act with respect to objections"—refer to section 42 of the Act of 1862, having reference to the manner in which a notice is to be served.

Rule absolute.

Solicitors—Nelson, Barr & Nelson, for the prosecution; Whyte, Collisson & Prichard, agents for H. Snaith, Boston, for the overseers.

BANKRUPTCY. 1884. Dec. 17. } *In re* TOWARD AND COMPANY; *ex parte* THE TRUSTEE.

Bankruptcy—Contract—Assignment of Money to become due under Contract—Title of Trustee—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 43.

A trader, who had contracted to build a ship to be paid for by instalments, assigned for value part of the money to become due under the last instalment, and afterwards became bankrupt. The trustee completed the contract at an expenditure of a sum less than the amount of the instalment:—Held, *that the assignment was valid against the trustee.*

Ex parte Nichols; *in re* Jones (52 Law J. Rep. Chanc. 635) *distinguished.*

This was an appeal from a decision of the Judge of the County Court at Newcastle-upon-Tyne.

The debtors, Messrs. Toward & Co., a firm of shipbuilders, had, on the 5th of May, 1883, entered into a contract with Messrs. Leach & Co. to build a ship for the sum of 7,150*l.*, to be paid by instalments, leaving a sum of 2,400*l.* to be paid on delivery.

On the 29th of February, 1884, the debtors being indebted to Hawks, Crawshay & Sons, and being pressed by them for payment, gave them the following order on Leach & Co.:—

"Messrs. Leach, Harrison & Forwood, Shipowners, 11, Dale Street, Liverpool.

"Dear Sirs,—We authorise you to pay to Messrs. Hawks, Crawshay & Sons of Gateshead-on-Tyne the sum of three hundred pounds sterling, and deduct the same from the finishing instalment of our No. 6 steamship named *Vigilant*, at present building for you in our yard.

"We are, yours truly,

"T. W. Toward & Co."

And on the 4th of March, the debtors being also indebted to Moss & Co., shipbrokers for commission, and being also pressed by them for payment, gave them an order upon Leach & Co. as follows:—

28th of February, 1884.

"Messrs. Leach, Harrison & Forwood, Liverpool.

"Please pay to Messrs. H. E. Moss & Co. the sum of one hundred and twenty-nine pounds, seven shillings, and sixpence, say 129*l.* 7*s.* 6*d.*, out of the instalment due to us when boat is delivered.

"T. & W. Toward & Co."

And these orders were delivered to Leach & Co. by Hawks & Co. and Moss & Co. respectively.

On the 15th of February, 1884, the debtors filed their petition, and, upon failure to pay a composition which had been accepted by the creditors, were adjudicated bankrupt on the 24th of May.

On the 17th of March, a special manager, who was afterwards also appointed trustee, was appointed, and made arrangements with Leach & Co. to complete the building of the ship. The ship was handed over completed to Leach & Co. on the 24th of June, 1884, when the last instalment became payable.

The amount expended by the trustee in fulfilling the contract was about 800*l.* The amount due from Leach & Co., after deducting the agreed damages for delay in completion and the sum of 600*l.* for advances by Leach & Co. to the trustee, amounted to 991*l.*

Of this sum Leach & Co. paid 512*l.* 12*s.* 8*d.*, and claimed to detain the balance of 429*l.* 7*s.* 6*d.* in respect of the orders in favour of Hawks & Co. and Moss & Co.

In re Toward; ex parte The Trustee, Bankr.

The County Court Judge made an order that this sum should be paid to the trustee, holding that the case was governed by *Ex parte Nichols; in re Jones* (1). The point was also taken that the orders in question were fraudulent preferences, and upon this point the learned Judge decided against the trustee (2).

Moss & Co. and Hawks & Co. appealed.

J. Lawson Walton, for the assignees.—*Ex parte Nichols* (1) is distinguishable. That was a case of a charge upon moneys not yet earned, and the judgment is upon the ground that the debtor was attempting to charge that in which he had no property, for there was no contract existing at the time of the charge under which gate-money would become payable. In the present case, the debtor had a large balance coming due to him under a contract subsisting at the time he made the charge; that contract was a valuable asset, and he could charge it or sell it; the right to receive the money was an existing right, though the money was not then payable. *Tooth* v. *Hallett* (3), which was also relied on, is not in point. That was decided on the ground that there was no available fund out of which the assignee could be paid; but here there is a large surplus after payment of expenses.

Pollard (*Mitcalfe Dale* with him).—*Tooth* v. *Hallett* (3) lays down the general principle that the right to receive money at a future time dependent upon the performance of a contract is not assignable. That is followed by *Ex parte Nichols* (1). The money has been earned by the trustee, and not by the debtor, and therefore belongs to the estate. It was, at the time of the assignment, money the earning of which depended upon a contingency, and which might never be earned at all; therefore it was not property then existing.

It was also contended that both these documents were bills of exchange, and required a stamp.

(1) 52 Law J. Rep. Chanc. 635; Law Rep. 22 Ch. D. 782.

(2) Upon the question of fraudulent preference, the Court ultimately decided that there were not sufficient materials before them to decide the question. The argument and judgment on that part of the case are therefore omitted.

(3) 38 Law J. Rep. Chanc. 396; Law Rep. 4 Chanc. 242.

MATHEW, J.—It is quite clear that these documents are intended to be a charge, and not bills or any other negotiable instruments.

I think that the learned County Court Judge was wrong in holding that the case of *Ex parte Nichols; in re Jones* (1) applied to the present case. The actual state of things at the time that the charges in respect of the contract were made was that, taking a rough estimate, about six-sevenths of the work had been executed, and about two-sevenths had been paid for, and the charge was made and intended to operate upon the margin, payable out of what as a fact was actually earned. It is conceded that if this margin had been created in the manner usual in building contracts—namely, by reservation of sums due to the builder, but not payable until the whole undertaking was complete—a charge made upon this would be valid; and that state of facts is, in my opinion, indistinguishable from that in the case before us: the circumstances are in effect the same. It is, however, contended that the judgment in *Ex parte Nichols* (1) is conclusive against this view; but upon examination of the ground of the decision in that case, it appears that it was that there the assignment was of something not then earned. The late Master of the Rolls said (4), "It is really the same thing as if the money had been paid by the public at the doors of the palace. It represents gross earnings of the persons who are carrying on the trade. When a man becomes bankrupt, the bankruptcy relates back to the act of bankruptcy on which it is founded, and the receipts from his business after the date of the act of bankruptcy, though they are in the hands of an agent who has received them, pass to the trustee in bankruptcy. The income derived from the business after the act of bankruptcy passes to the trustee. The business of the palace being carried on, these sums are payments made by the customers to the man who was carrying it on. They stand in the same position as payments made by the public for admission to a theatre, or payments made by the customers of a man who keeps a cheesemonger's shop. That being so, it is clear

(4) 52 Law J. Rep. Chanc. at p. 637; Law Rep. 22 Ch. D. at p. 785.

that the title of the trustee relates back to the act of bankruptcy, that is, to the filing of the petition. But it is said that the payments were received by a railway company under a contract which the trustee affirms. That is a fallacy. The trustee would have had a right to the debtor's share of the gross sums received by the company, even if he had annulled the contract. His affirmance of the contract was only an assent to the division of the gross sums in the proportion there laid down; he did not adopt the contract in any other sense. That being so, his title is quite unaffected by any assent to the contract. Then it is said that the respondents are claiming under a mortgage or assignment made to them by the bankrupt before the bankruptcy. The answer to that is that by no assignment or charge can a bankrupt give a good title as against his trustee to profits of his business accruing after the commencement of the bankruptcy. The bankrupt cannot as against the trustee assign the profits; they are not his property." The *ratio decidendi* is therefore perfectly clear that the assignment was of profits not then earned, and when earned the property of the trustee; that has nothing to do with this case.

CAVE, J.—I am of the same opinion. I desire to add a few words with reference to the case of *Ex parte Nichols* (1), which has, I think, been misunderstood, owing, perhaps, to the observation which the late Master of the Rolls is reported to have made in the course of the argument with reference to *Brice* v. *Bannister* (5). The case of *Ex parte Nichols* (1) is entirely distinguishable, the facts being quite different. There would be some analogy between this case and that if, for example, the debtor had on the 31st of December, 1883, executed a charge on all moneys to be received or contracts to be entered into in 1884, and had become a bankrupt on the 1st of January, 1884, and his trustee had elected to carry on the business, and received moneys under contracts, and the assignee had now been attempting to get hold of such moneys. It would be analogous to *Tooth* v. *Hallett* (3) if there had not been a balance after paying the trustee the costs of completing the ship. But the facts in the present case are quite different from those in either of those cases. The trustee's contention is equivalent to saying that if a man who has a contract to build to the value of 5,000*l.*, and has executed about 100*l.* worth of work, gets an advance of 50*l.* to pay for materials, and gives a charge for that amount on the sum to be paid on the last instalment, and then becomes bankrupt, the trustee may expend the necessary money, finish the contract, receive the instalment, and not repay the 50*l.* Fortunately that is not the law.

Appeal dismissed; leave to appeal refused.

(5) 47 Law J. Rep. Q.B. 722; Law Rep. 3 Q.B. D. 569.

Solicitors—J. & E. Scott, agents for T. Tinley Dale, South Shields, for the trustee; Wynne, Holme & Wynne, agents for H. Forshaw & Hawkins, Liverpool, for Messrs. Moss & Co.; J. Titley, agent for Dix & Warlow, Newcastle, for Hawks & Co.

BANKRUPTCY. 1885. Jan. 19. } *In re* MAUGHAN; *ex parte* THE TRUSTEE.

Bankruptcy — Disclaimer of onerous "Property" — Trust Property — Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 55, *sub-s.* 1, 44, *sub-s.* 1, *and* 168.

The power of the trustee under section 55 *of the Bankruptcy Act*, 1883, *to disclaim onerous property is not confined to "property divisible amongst creditors."*

Therefore the trustee is not precluded from disclaiming property merely because the property is "held by the bankrupt upon trust for any other person."

This was an application by the trustee for leave to disclaim certain leasehold property.

On the 6th of May, 1879, the Investment Company (Limited) entered into an agreement, not under seal, for an underlease to the debtor of a portion of certain premises, 41 Cheapside, London, for twenty-one years.

The debtor entered into possession under this agreement.

In re Maughan; ex parte The Trustee, Bankr.

By an agreement made on the 13th of June, 1884, the debtor agreed to sell to Maughan's Patent Geyser Company his interest in the said premises, and to execute all such assurances as should be necessary for vesting in the company the property agreed to be sold and for giving to them the full benefit of the agreement.

The purchase was to be completed on the 30th of June, 1884.

The debtor delivered up possession of the premises to Maughan's Patent Geyser Company.

A receiving order was made on the 29th of August, 1884, and a scheme of arrangement of the affairs of the debtor was subsequently passed by his creditors and confirmed by the Court.

Holmes, solicitor, for the trustee.

Cooper Willis, Q.C., for the Investment Company (Limited), objected that there was no property in the trustee to be disclaimed. If the debtor has any interest in the property it is as trustee for Maughan's Patent Geyser Company; and by section 44, sub-s. 1, of the Bankruptcy Act, 1883, the "property of the bankrupt" does not comprise property held by the bankrupt on trust for any other person. He referred to *The East and West India Dock Company* v. *Hill* (1).

[FIELD, J., referred to the definition of "property" in section 168.]

Sidney Woolf, for Maughan's Patent Geyser Company, referred to *Ex parte Dyke; in re Morrish* (2) and *Walsh* v. *Lonsdale* (3).

FIELD, J.—I think I ought to accede to this application, and I think I have power to do so. I think that, upon the true construction of the statute, the property here is property which the trustee is entitled to ask me to give him leave to disclaim. After the execution of the agreement of the 6th of May, 1879, the debtor had a property in land, which was burdened with onerous covenants, and his trustee, if there had been one, might have asked for liberty to disclaim. But since that date the debtor has agreed to assign his property by words large enough to pass all the interest he had, but he did not complete the agreement. He was under a covenant for further assurances. He has no reversion, but he has land in a popular sense. The question is whether he has land within the meaning of section 55. Section 55 begins by saying, "where any part of the property of the bankrupt, &c." Mr. Willis says "property" means property divisible amongst creditors, and refers to section 44, sub-s. 1. But am I bound to read property in section 55 with the limitation of "divisible among creditors"? I think not; for section 55 speaks of property "burdened with onerous covenants," which means property of no benefit to creditors. I think I am bound to give full meaning to the word "property." Mr. Willis says that this is not "land" within the meaning of the section. But I think it is. It is true the debtor has passed over his possession absolutely, but he is under an obligation to his lessor, and I think therefore that he has property within the meaning of the section. I think it would be a pity to refine and cut down the benefit of this provision.

Leave to disclaim. Costs to be paid out of the estate.

The trustee and Maughan's Patent Geyser Company undertook to deliver up possession of the premises to the Investment Company (Limited).

Solicitors—Ingle, Cooper & Holmes, for trustee; Hughes, Hooker & Co., for Investment Company (Limited); Loxley & Morley, for Maughan's Patent Geyser Company.

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(1) 52 Law J. Rep. Chanc. 44; Law Rep. 22 Ch. D. 14.

(2) 52 Law J. Rep. Chanc. 570; Law Rep. 22 Ch. D. 410.

(3) 52 Law J. Rep. Chanc. 2; Law Rep. 21 Ch. D. 9.

[IN THE HOUSE OF LORDS.]

1884. March 31. April 1. May 16.

FOAKES *v.* BEER.

Debtor and Creditor—Accord—Agreement to accept Less Sum than Debt.

The doctrine stated in Pinnel's Case (5 Rep. 117), *and recognised in* Cumber *v.* Wane (1 Str. 426; 1 Sm. L.C. (8th ed.) 357), *that "payment of a lesser sum in satisfaction of a greater cannot be a satisfaction of the whole," has been too long accepted as law to be disturbed.*

An agreement by a judgment creditor, in consideration of immediate payment of part of the judgment debt, to accept payment to himself or his nominee of the residue of the debt and costs by instalments without interest in full satisfaction of the judgment, falls within the above doctrine, and does not bar the creditor from issuing execution for interest on the judgment debt after all the instalments have been paid.

This was an appeal from a decision of the Court of Appeal which reversed one of the Queen's Bench Division. The case is reported in the Courts below 52 Law J. Rep. Q.B. 426, 712; Law Rep. 11 Q.B. D. 221.

The respondent having recovered judgment for 2,090*l.* from the appellant, agreed with the appellant in writing not under seal to accept payment by instalments of 500*l.* down and 150*l.* half yearly till the whole sum should be paid. The appellant fully performed his part of the agreement, and the respondent then claimed to issue execution on the judgment for interest on the judgment debt.

An issue was directed to be tried, when the above facts were found by a jury. Cave, J., ruled that the respondent was not entitled to issue execution for any sum on the judgment.

His decision was affirmed by a divisional Court, but reversed by the Court of Appeal upon the authority of *Cumber* v. *Wane* (1).

Holl, Q.C., and *Winch*, for the appellant.—There is nothing in reason or—except the case of *Cumber* v. *Wane* (1)—in law to make this agreement invalid. There is consideration for it, for by not enforcing his claim against the debtor and driving him into bankruptcy, the creditor might expect to be paid in full instead of merely getting a dividend. If the creditor thinks the agreement is for his benefit, why should the Court say it is not? *Cumber* v. *Wane* (1) has been assailed frequently—*e.g.* in *Couldery* v. *Bartrum* (2), *per* Jessel, M.R., and in notes to *Smith's Leading Cases* (3) by Smith, with the tacit approval of all his editors, including Sir Henry Keating and the late Mr. Justice Willes. The reasoning in *Cumber* v. *Wane* (1) would not be regarded as sound now—namely, that the satisfaction must be held reasonable by the Court. In *Reynolds* v. *Pinhowe* (4), which was not cited in *Cumber* v. *Wane* (1), it was held that the saving of trouble was a sufficient consideration; and see *Wilkinson* v. *Byers* (5), observations of Littledale, J. In *Pinnel's Case* (6) the question of convenience was overlooked. But the convenience is well understood in business, as is shewn by the constant practice of tradesmen to allow discount for prompt payment where there is no agreement to give credit. In fact the decision in *Cumber* v. *Wane* (1) has never been acted upon in practice, and the Courts have confined its application within such narrow limits that there is no longer any principle involved in it. The following cases are really inconsistent with *Cumber* v. *Wane* (1): *Heathcote* v. *Crookshanks* (7), *Thomas* v. *Heathorn* (8), *Sibree* v. *Tripp* (9), *Curlewis* v. *Clark* (10). *Fitch* v. *Sutton* (11), in which it was held that payment of a less sum by cheque was not a satisfaction, is clearly wrong—*Goddard* v. *O'Brien* (12). If *Cumber* v. *Wane* (1) is to be maintained, the result of the

(1) 1 Str. 426; 1 Sm. L.C. (8th ed.) 357.

(2) Law Rep. 19 Ch. D. 394.

(3) 1 Sm. L.C. (4th ed.) 253; (8th ed.) 367.

(4) Cro. Eliz. 429.

(5) 1 Ad. & E. 106; 3 Law J. Rep. K.B. 144.

(6) 5 Rep. 117.

(7) 2 Term. Rep. 24.

(8) 2 B. & C. 477.

(9) 15 Mee. & W. 23; 15 Law J. Rep. Exch. 318.

(10) 3 Exch. Rep. 375; 18 Law J. Rep. Exch. 144.

(11) 5 East, 230.

(12) Law Rep. 9 Q.B. D. 37.

cases is that there may be satisfaction by acceptance of a less sum if it be secured by cheque, bill, or promissory note, not if it be paid in gold or bank-notes. In the present case the agreement was not to take a less sum, but merely to give time.

Bompas, *Q.C.*, and *A. B. P. Gaskell*, for the respondent.—Part payment is no consideration for giving up the residue of a debt, since the performance of what the law imposes as a duty cannot be a consideration. *Cumber* v. *Wane* (1) is supported by a series of authorities—*Dixon* v. *Adams* (13), *Richards* v. *Bartlets* (14), *Goring* v. *Goring* (15), *Geang* v. *Swaine* (16), *McManus* v. *Bark* (17), *Fitch* v. *Sutton* (11), *Co. Lit.* 212*b*, *Adams* v. *Tapling* (18), *Down* v. *Hatcher* (19), and *Evans* v. *Powis* (20). All the cases in which *Cumber* v. *Wane* (1) has been more or less departed from treat it as law that the payment of a smaller sum than is due is not sufficient. It is a matter of public policy that a man should not be allowed to refuse to pay debts, and then make his refusal to pay a consideration for extorting more favourable terms from his creditor. This has been laid down as to seamen's wages in *Stilk* v. *Myrick* (21), *Harris* v. *Watson* (22), *Newman* v. *Walters* (23), *Clutterbuck* v. *Coffin* (24), and *Harris* v. *Carter* (25).

[LORD BLACKBURN.—The doctrine of *Cumber* v. *Wane* (1) has never been laid down in this House, nor (except in *Dixon* v. *Adams* (13), which went too far) in a Court of Error.]

It was too firmly established ever to be the subject of appeal. The House will not treat it with less respect on that account—*Danford* v. *McAnulty* (26).

(13) Cro. Eliz. 538.
(14) 1 Leon. 19.
(15) Yelv. 10.
(16) 1 Lutw. 464.
(17) 39 Law J. Rep. Exch. 65; Law Rep. 5 Exch. 65.
(18) 4 Mod. 88.
(19) 10 Ad. & E. 121; 8 Law J. Rep. Q.B. 190.
(20) 1 Exch. Rep. 601.
(21) 2 Camp. 317.
(22) Peake, 72.
(23) 3 Bos. & P. 612.
(24) 4 Sc. N.R. 509; 11 Law J. Rep. C.P. 65.
(25) 3 E. & B. 559; 23 Law J. Rep. Q.B. 295.
(26) 52 Law J. Rep. Q.B. 652; Law Rep. 8 App. Cas. 456.

[LORD BLACKBURN.—It has not been acted upon in mercantile practice, and not often in the Courts.]

It has been always recognised as law, and cannot now be overruled. *Lovelace* v. *Cocket* (27) and *Hawes* v. *Birch* (28) carried the rule still further.

Holl, *Q.C.*, in reply.—The decisions as to seamen's wages are put upon special grounds of public policy applicable to such cases.

Cur adv. vult.

THE LORD CHANCELLOR (EARL OF SELBORNE) (on May 16).—Upon the construction of the agreement of the 21st of December, 1876, I cannot differ from the conclusion in which both the Courts below were agreed. If the operative part could properly be controlled by the recitals, I think there would be much reason to say that the only thing contemplated by the recitals was giving time for payment, without any relinquishment on the part of the judgment creditor of any portion of the amount recoverable (whether for principal or for interest) under the judgment. But the agreement of the judgment creditor, which follows the recitals, is that she "will not take any proceedings whatever on the judgment," if a certain condition is fulfilled. What is that condition? Payment of the sum of 150*l.* in every half year, "until the whole of the said sum of 2,090*l.* 19*s.*" (the aggregate amount of the principal debt and costs, for which judgment had been entered) "shall have been fully paid and satisfied." A particular "sum" is here mentioned, which does not include the interest then due, or future interest. Whatever was meant to be payable at all, under this agreement, was clearly to be payable by half-yearly instalments of 150*l.* each: any other construction must necessarily make the conditional promise nugatory. But to say that the half-yearly payments were to continue till the whole sum of 2,090*l.* 19*s.* "and interest thereon" should have been fully paid and satisfied, would be to introduce very important words into the agreement, which are not there, and of which I cannot say that they are necessarily implied.

(27) 1 Brownl. 47.
(28) Ibid. 71.

Although, therefore, I may (as indeed I do) very much doubt whether the effect of the agreement, as a conditional waiver of the interest to which she was by law entitled under the judgment, was really present to the mind of the judgment creditor, still I cannot deny that it might have that effect, if capable of being legally enforced.

But the question remains whether the agreement is capable of being legally enforced. Not being under seal, it cannot be legally enforced against the respondent unless she received consideration for it from the appellant, or unless, though without consideration, it operates by way of accord and satisfaction so as to extinguish the claim for interest. What is the consideration? On the face of the agreement none is expressed except a present payment of 500*l.* on account and in part of the larger debt then due and payable by law under the judgment. The appellant did not contract to pay the future instalments of 150*l.* each at the times therein mentioned; much less did he give any new security in the shape of negotiable paper or in any other form. The promise *de futuro* was only that of the respondent that, if the half-yearly payments of 150*l.* each were regularly paid, she would "take no proceedings whatever on the judgment." No doubt, if the appellant had been under no antecedent obligation to pay the whole debt, his fulfilment of the condition might have imported some consideration on his part for that promise. But he was under that antecedent obligation; and payment at those deferred dates, by the forbearance and indulgence of the creditor, of the residue of the principal debt and costs, could not, in my opinion, be a consideration for the relinquishment of interest and discharge of the judgment, unless the payment of the 500*l.* at the time of signing the agreement was such a consideration. As to accord and satisfaction, in point of fact there could be no complete satisfaction so long as any future instalment remained payable; and I do not see how any mere payments on account could operate in law as a satisfaction *ad interim* conditionally upon other payments being afterwards duly made, unless there was a consideration sufficient to support the agreement while still unexecuted. Nor was anything, in fact, done by the respondent in this case, on the receipt of the last payment, which could be tantamount to an acquittance if the agreement did not previously bind her.

The question, therefore, is nakedly raised by this appeal whether your Lordships are now prepared not only to overrule, as contrary to law, the doctrine stated by Sir Edward Coke to have been laid down by all the Judges of the Common Pleas in *Pinnel's Case* (6) in 1602, and repeated in his note to *Littleton*, section 344 (29), but to treat a prospective agreement not under seal for satisfaction of a debt, by a series of payments on account to a total amount less than the whole debt, as binding in law, provided those payments are regularly made—the case not being one of a composition with a common debtor, agreed to *inter se* by several creditors. I prefer so to state the question, instead of treating it (as it was put at the Bar) as depending on the authority of the case of *Cumber* v. *Wane* (1), decided in 1718. It may well be that distinctions which in later cases have been held sufficient to exclude the application of that doctrine existed and were improperly disregarded in *Cumber* v. *Wane* (1), and yet that the doctrine itself may be law, rightly recognised in *Cumber* v. *Wane* (1), and not really contradicted by any later authorities. And this appears to me to be the true state of the case. The doctrine itself, as laid down by Sir Edward Coke, may have been criticised as questionable in principle by some persons whose opinions are entitled to respect, but it has never been judicially overruled; on the contrary, I think it has always, since the sixteenth century, been accepted as law. If so, I cannot think that your Lordships would do right if you were now to reverse as erroneous a judgment of the Court of Appeal proceeding upon a doctrine which has been accepted as part of the law of England for 280 years.

The doctrine, as stated in *Pinnel's Case* (6), is, "that payment of a lesser sum on the day" (it would of course be the same after the day) "in satisfaction of a greater, cannot be any satisfaction for the whole,

(29) Co. Lit. 212*b*.

because it appears to the Judges that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum." As stated in *Coke on Littleton* (212*b*), it is, "where the condition is for payment of 20*l.* the obligor or feoffor cannot at the time appointed pay a lesser sum in satisfaction of the whole, because it is apparent that a lesser sum of money cannot be a satisfaction of a greater;" adding (what is beyond controversy) that an acquittance under seal in full satisfaction of the whole would (under like circumstances) be valid and binding.

The distinction between the effect of a deed under seal and that of an agreement by parol, or by writing not under seal, may seem arbitrary, but it is established in our law; nor is it really unreasonable or practically inconvenient that the law should require particular solemnities to give to a gratuitous contract the force of a binding obligation. If the question be (as, in the actual state of the law, I think it is) whether consideration is or is not given in a case of this kind by the debtor who pays down part of the debt presently due from him for a promise by the creditor to relinquish, after certain further payments on account, the residue of the debt, I cannot say that I think consideration is given in the sense in which I have always understood that word as used in our law. It might be (and indeed I think it would be) an improvement in our law if a release or acquittance of the whole debt on payment of any sum which the creditor might be content to receive by way of accord and satisfaction (though less than the whole) were held to be generally binding, though not under seal; nor should I be unwilling to see equal force given to a prospective agreement, like the present, in writing, though not under seal; but I think it impossible, without refinements which practically alter the sense of the word, to treat such a release or acquittance as supported by any new consideration proceeding from the debtor. All the authorities subsequent to *Cumber* v. *Wane* (1) which were relied upon by the appellant at your Lordships' bar—such as *Sibree* v. *Tripp* (9), *Curlewis* v. *Clark* (10), and *Goddard* v. *O'Brien* (12)—have proceeded upon the distinction that, by giving negotiable paper or otherwise, there had been some new consideration for a new agreement, distinct from mere money payments in or towards discharge of the original liability. I think it unnecessary to go through those cases or to examine the particular grounds on which each of them was decided. There are no such facts in the case now before your Lordships. What is called "any benefit, or even any legal possibility of benefit," in Mr. Smith's notes to *Cumber* v. *Wane* (1) is not, as I conceive, that sort of benefit which a creditor may derive from getting payment of part of the money due to him from a debtor who might otherwise keep him at arm's length or possibly become insolvent, but is some independent benefit, actual or contingent, of a kind which might in law be a good and valuable consideration for any other sort of agreement not under seal.

My conclusion is that the order appealed from should be affirmed and the appeal dismissed with costs, and I so move your Lordships.

LORD BLACKBURN.—The first question raised is, as to what was the true construction of the memorandum of agreement made on the 21st of December, 1876. What was it that the parties by that writing agreed to?

The appellant contends that they meant that on payment down of 500*l.*, and payment within a month after the 1st of July and the 1st of January in each ensuing year of 150*l.* until the sum of 2,090*l.* 19*s.* was paid, the judgment for that sum and interest should be satisfied, for an agreement to take no proceedings on the judgment is equivalent to treating it as satisfied. This construction of the memorandum requires that after the tenth payment of 150*l.* there should be a further payment of 90*l.* 19*s.* made within the next six months.

This is the construction which all three Courts below have put upon the memorandum.

The respondent contends that the true construction of the memorandum was that time was to be given on those conditions for five years, the judgment being, on default of any one payment, enforceable for whatever was still unpaid, with interest from the date the judgment was signed, but

that the interest was not intended to be forgiven at all.

If this is the true construction of the agreement the judgment appealed against is right and should be affirmed, whether the reason on which the Court of Appeal founded its judgment was right or not. I am, however, of opinion that the Courts below, who on this point were unanimous, put the true construction on the memorandum. I do not think the question free from difficulty. It would have been easy to have expressed, in unmistakable words, that on payment down of 500*l.*, and punctual payment at the rate of 300*l.* a year till 2,090*l.* 19*s.* was paid, the judgment should not be enforced either for principal or interest; or language might have been used which should equally clearly have expressed that, though time was to be given, interest was to be paid in addition to the instalments. The words actually used are such that I think it is quite possible that the two parties put a different construction on the words at the time; but I think the words "till the said sum of 2,090*l.* 19*s.* shall have been fully paid and satisfied" cannot be construed as meaning "till that sum, with interest from the day judgment was signed, shall have been fully paid and satisfied," nor can the promise "not to take any proceedings whatever on the judgment" be cut down to meaning any proceedings except those necessary to enforce payment of interest.

I think, therefore, that it is necessary to consider the ground on which the Court of Appeal did base their judgment, and to say whether the agreement can be enforced. I construe it as accepting and taking 500*l.* in satisfaction of the whole 2,090*l.* 19*s.*, subject to the condition that unless the balance of the principal debt was paid by the instalments, the whole might be enforced with interest. If instead of 500*l.* in money it had been a horse valued at 500*l.*, or a promissory note for 500*l.*, the authorities are that it would have been a good satisfaction; but it is said to be otherwise as it was money.

This is a question, I think, of difficulty. In *Co. Lit.* 212*b*, Lord Coke says: "where the condition is for payment of 20*l.*, the obligor or feoffor cannot at the time appointed pay a lesser sum in satisfaction of the whole, because *it is apparent* that a lesser sum of money *cannot* be a satisfaction of a greater. . . . If the obligor or feoffor pay a lesser sum either before the day or at another place than is limited by the condition, and the obligee or feoffee receiveth it, this is a good satisfaction." For this he cites *Pinnel's Case* (6). That was an action on a bond for 16*l.* conditioned for the payment of 8*l.* 10*s.* on the 11th of November, 1600. Plea that defendant, at plaintiff's request, before the said day, to wit, on the 1st of October, paid to the plaintiff 5*l.* 2*s.* 2*d.*, which the plaintiff accepted in full satisfaction of the 8*l.* 10*s.* The plaintiff had judgment for the insufficient pleading. But though this was so, Lord Coke reports that it was resolved by the whole Court of Common Pleas "that payment of a lesser sum on the day in satisfaction of a greater cannot be any satisfaction for the whole, because it appears to the Judges that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum, but the gift of a horse, hawk, or robe, &c., in satisfaction is good, for it shall be intended that a horse, hawk, or robe, &c., might be more beneficial to the plaintiff than the money in respect of some circumstance, or otherwise the plaintiff would not have accepted of it in satisfaction. But when the whole sum is due, by no intendment the acceptance of parcel can be a satisfaction to the plaintiff; but in the case at bar it was resolved that the payment and acceptance of parcel before the day in satisfaction of the whole would be a good satisfaction in regard of circumstance of time; for peradventure parcel of it before the day would be more beneficial to him than the whole at the day, and the value of the satisfaction is not material; so if I am bound in 20*l.* to pay you 10*l.* at Westminster, and you request me to pay you 5*l.* at the day at York, and you will accept it in full satisfaction for the whole 10*l.*, it is a good satisfaction for the whole, for the expenses to pay it at York is sufficient satisfaction."

There are two things here resolved. First, that where a matter paid and accepted in satisfaction of a debt certain might by any possibility be more beneficial to the creditor than his debt, the Court

will not enquire into the adequacy of the consideration. If the creditor, without any fraud, accepted it in satisfaction when it was not a sufficient satisfaction it was his own fault; and that payment before the day might be more beneficial, and consequently that the plea was in substance good, and this must have been decided in the case.

There is a second point stated to have been resolved—namely, "That payment of a lesser sum on the day cannot be any satisfaction of the whole, because it appears to the Judges that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum." This was certainly not necessary for the decision of the case; but though the resolution of the Court of Common Pleas was only a *dictum*, it seems to me clear that Lord Coke deliberately adopted the *dictum*, and the great weight of his authority makes it necessary to be cautious before saying that what he deliberately adopted as law was a mistake. And though I cannot find that in any subsequent case this *dictum* has been made the ground of the decision—except in *Fitch* v. *Sutton* (11), as to which I shall make some remarks later, and in *Down* v. *Hatcher* (19), as to which Mr. Baron Parke in *Cooper* v. *Parker* (30) said, "Whenever the question may arise as to whether *Down* v. *Hatcher* (19) is good law, I should have a great deal to say against it"—yet there certainly are cases in which great Judges have treated the *dictum* in *Pinnel's Case* (6) as good law.

For instance, in *Sibree* v. *Tripp* (9) Mr. Baron Parke says, "It is clear if the claim be a liquidated and ascertained sum, payment of part cannot be satisfaction of the whole, although it may under certain circumstances be evidence of a gift of the remainder." And Mr. Baron Alderson, in the same case, says, "It is undoubtedly true that payment of a portion of a liquidated demand in the same manner as the whole liquidated demand which ought to be paid is payment only in part, because it is not one bargain but two—namely, payment of part, and an agreement without consideration to give up the residue. The Courts might very well have held the contrary and have left the matter to the agreement of the parties, but undoubtedly the law is so settled." After such strong expressions of opinion, I doubt much whether any Judge sitting in a Court of first instance would be justified in treating the question as open. But as this has very seldom, if at all, been the ground of the decision even in a Court of first instance, and certainly never been the ground of a decision in the Court of Exchequer Chamber, still less in this House, I did think it open in your Lordships' House to reconsider this question. And, notwithstanding the very high authority of Lord Coke, I think it is not the fact that to accept prompt payment of a part only of a liquidated demand can never be more beneficial than to insist on payment of the whole. And if it be not the fact, it cannot be apparent to the Judges.

I will first examine the authorities. If a defendant pleaded the general issue, the plaintiff could join issue at once, and, if the case was not defended, get his verdict at the next assizes. But by pleading a special plea the plaintiff was obliged to reply; and the defendant often caused the plaintiff, merely by the delay occasioned by replying, to lose an assize. If the replication was one to which he could demur, he made this sure. Strangely enough, it seems long to have been thought that if the defendant kept within reasonable bounds, neither he nor his lawyers were to blame in getting time in this way by a sham plea that a chattel was given and accepted in satisfaction of the debt. The recognised forms were giving and accepting in satisfaction a beaver hat—*Young* v. *Rudd* (31)—or a pipe of wine (32). All this is now antiquated. But whilst it continued to be the practice, the pleas founded on the first part of the resolution in *Pinnel's Case* (6) were very common; and that law was perfectly trite. No one for a moment supposed that a beaver hat was really given and accepted; but every one knew that the law was that if it was really given and accepted it was a good satisfaction.

But special pleas founded on the other resolution in *Pinnel's Case* (6), on what I

(30) 15 Com. B. Rep. 828; 24 Law J. Rep. C.P. 68.

(31) 5 Mod. 86.

(32) 3 Chit. Plead. (7th ed.), 92.

have ventured to call the *dictum*, were certainly not common. I doubt if a real defence of this sort was ever specially pleaded. When there really was a question as to whether a debt was satisfied by a payment of a smaller sum, the defendant pleaded the general issue; and if it was proved to the satisfaction of the jury that a smaller sum had been paid and accepted in satisfaction of a greater, if objection was raised, the jury might perhaps, as suggested by Mr. Justice Holroyd in *Thomas* v. *Heathorn* (8), find that the circumstances were such that the legal effect was to be as if the whole was paid down and a portion thrown back as a God's-penny. This, however, seems to me to be an unsatisfactory and artificial way of avoiding the effect of the *dictum*, and it could not be applied to such an agreement as that now before this House.

For whatever reason it was, I know of no case in which the question was raised whether a payment of a lesser sum could be satisfaction of a liquidated demand, from *Pinnel's Case* (6) down to *Cumber* v. *Wane* (1), a period of 115 years.

In *Adams* v. *Tapling* (18), where the plea was bad for many other reasons, it is reported to have been said by the Court that, "in covenant where the damages are uncertain, and to be recovered, as in this case, a lesser thing may be done in satisfaction; and there accord and satisfaction is a good plea." No doubt this was one of the cases which Mr. Baron Parke would have cited in support of his opinion that *Down* v. *Hatcher* (19) was not good law. The Court are said to have gone on to recognise the *dictum* in *Pinnel's Case* (6), or at least not to dissent from it; but it was not the ground of their decision. In every other reported case which I have seen the question arose on a demurrer to a replication to what was obviously a sham or dilatory plea.

Some doubt has been made as to what the pleadings in *Cumber* v. *Wane* (1) really were. I have obtained the record. The plea is that after the promises aforesaid, and before the issuing of the writ, it was agreed between the said George and Edward Cumber that he, the said George, "*daret eidem Edwardo Cumber quandam notam in script. vocatam* 'a promissory note,' *manu propriâ ipsius Georgii subscript. pr. solucõn eidem Edwardo Cumber vel ordini quinque librarum*," fourteen days after date, in full satisfaction and exoneration of the premises and promises, which said note in writing the said George then gave to the said Edward Cumber, and the said Edward Cumber then and there received from the said George the said note in full satisfaction and discharge of the premises and promises.

The replication is that "the said George did not give to him, Edward, any note in writing called a promissory note with the hand of him, George, subscribed for the payment to him, Edward, or his order, 5*l.*, fourteen days after date, in full satisfaction and discharge of the premises and promises." To this there is a demurrer and judgment in the Common Pleas for the plaintiff "that the replication was good in law."

The reporter, oddly enough, says there was an immaterial replication. The effect of the replication is to put in issue the substance of the defence—namely, the giving in satisfaction—*Young* v. *Rudd* (31); and certainly that was not immaterial. But for some reason—I do not stop to enquire what—Chief Justice Pratt prefers to base the judgment, affirming that of the Common Pleas, on the supposed badness of the plea rather than on the sufficiency of the replication. It is impossible to doubt that the note, which it is averred in the plea was given as satisfaction, was a negotiable note. And therefore this case is in direct conflict with *Sibree* v. *Tripp* (9).

Two cases require to be carefully considered. The first is *Heathcote* v. *Crookshanks* (7). The plea there pleaded would, I think, now be held perfectly good—see *Norman* v. *Thompson* (33); but Mr. Justice Buller seems to have thought otherwise. He says, "Thirdly, it was said that all the creditors were bound by this agreement to forbear; but that is not stated by the plea. It is only alleged that they agreed to take a certain proportion; but that is a *nudum pactum*, unless they had afterwards accepted it. In the case in which *Cumber* v. *Wane* (1) was denied

(33) 4 Exch. Rep. 755; 19 Law J. Rep. Exch. 193.

to be law—*Hardcastle* v. *Howard*—the party actually accepted. But as the plaintiff in the present case refused to take less than the whole demand, the plea is clearly bad."

That decision goes entirely on the ground that accord without satisfaction is not a plea. I do not think it can fairly be said that Mr. Justice Buller meant, by saying "that is a *nudum pactum*, unless they had afterwards accepted it," to express an opinion that if the dividend had been accepted, it would have been a good satisfaction. But he certainly expresses no opinion the other way.

In *Fitch* v. *Sutton* (11), not only did the plaintiff not accept the payment of the dividend in satisfaction, but he refused to accept it at all unless the defendant promised to pay him the balance when of ability, and the defendant assented and made the promise required, so that but for the fact that other creditors were parties to the composition there could have been no defence. There was no point of pleading in that case, the whole being open under the general issue. And in *Steinman* v. *Magnus* (34) it was pretty well admitted by Lord Ellenborough that the decision in *Fitch* v. *Sutton* (11) would have been the other way if they had understood the evidence as the reporter did. But though the misapprehension of the Judges as to the facts, and the absence of any acceptance of the dividend, greatly weaken the weight of *Fitch* v. *Sutton* (11), still it remains that Lord Ellenborough—a very great Judge indeed—did, however hasty or unnecessary it may have been to express such an opinion, say, "It is impossible to contend that acceptance of 17*l.* 10*s.* is an extinguishment of a debt of 50*l.* There must be some consideration for the relinquishment of the residue—something collateral to shew a possibility of benefit to the party relinquishing his further claim—otherwise the agreement is *nudum pactum*. But the mere promise to pay the rest when of ability put the plaintiff in no better condition than he was before. It was expressly determined in *Cumber* v. *Wane* (1) that acceptance of a security for a lesser sum cannot be pleaded in satisfaction of a similar security for a greater. And though that case was said by me in argument in *Heathcote* v. *Crookshanks* (7) to have been denied to be law, and in confirmation of that Mr. Justice Buller afterwards referred to a case (stated to be that of *Hardcastle* v. *Howard*, Hilary Term, 26 Geo. 3.), yet I cannot find any case of that sort, and none has been now referred to; on the contrary, the decision in *Cumber* v. *Wane* (1) is directly supported by the authority of *Pinnel's Case* (6), which never appears to have been questioned."

I must observe that, whether *Cumber* v. *Wane* (1) was or was not denied to be law in *Hardcastle* v. *Howard*, it certainly was denied to be law in *Sibree* v. *Tripp* (9); and that, though it is quite true that *Pinnel's Case* (6), as far as regards the points actually raised in the case, has not only never been questioned, but is often assented to, I am not aware that in any case before *Fitch* v. *Sutton* (11), unless it be *Cumber* v. *Wane* (1), has that part of it which I venture to call the *dictum* ever been acted upon; and, as I have pointed out, had it not been for the composition with other creditors, there could have been no defence in *Fitch* v. *Sutton* (11), whether the *dictum* in *Pinnel's Case* (6) was right or wrong.

Still this is an authority, and I have no doubt that it was on the ground of this authority, and the adhesion of Mr. Justice Bayley to it in *Thomas* v. *Heathorn* (8), that Barons Parke and Alderson expressed themselves as they did in the passages I have cited from *Sibree* v. *Tripp* (9); and I think that their expressions justify Mr. John William Smith in laying it down as he does in his note to *Cumber* v. *Wane* (1) in the second edition of his *Leading Cases*, that "a liquidated and undisputed money demand, of which the day of payment is past (not founded upon a bill of exchange or promissory note), cannot even with the consent of the creditor be discharged by mere payment by the debtor of a smaller amount of money in the same manner as he was bound to pay the whole." I am inclined to think that this was settled in a Court of first instance. I think, however, that it was originally a mistake.

What principally weighs with me in thinking that Lord Coke made a mistake

(34) 11 East, 390.

of fact is my conviction that all men of business, whether merchants or tradesmen, do every day recognise and act on the ground that prompt payment of a part of their demand may be more beneficial to them than it would be to insist on their rights and enforce payment of the whole. Even where the debtor is perfectly solvent, and sure to pay at last, this often is so. Where the credit of the debtor is doubtful it must be more so. I had persuaded myself that there was no such long-continued action on this *dictum* as to render it improper in this House to reconsider the question. I had written my reasons for so thinking, but as they were not satisfactory to the other noble and learned Lords who heard the case, I do not now repeat them nor persist in them.

I assent to the judgment proposed, though it is not that which I had originally thought proper.

Lord Watson.—I am of opinion that the judgment of the Court of Appeal ought to be affirmed.

I regret that I have been unable to adopt that construction of the memorandum of agreement which has commended itself to your Lordships who have already spoken as well as to the Judges of the Court of Appeal. It humbly appears to me that the respondent did not intend to pass, and did not pass from her legal claim for interest on the judgment debt due to her by the appellant. She undertakes not to take proceedings on the judgment, provided the stipulated termly instalments are regularly paid, "until the whole of the said sum of 2,090*l.* 19*s.* shall have been fully paid and satisfied." But these words, "the said sum," ought, in my opinion, to be construed as referring to the sum of 2,090*l.* 19*s.* previously described as being contained in a judgment of Her Majesty's High Court of Justice, and therefore bearing interest *ex lege*. The whole context of the memorandum appears to me to be consistent with this view, and to point strongly to the inference that there was no agreement, or even proposal, that the respondent should make any abatement of her legal claims, or do more than give her debtor time on the conditions expressed, "to pay such judgment."

I must assume, however, that I have wrongly construed the memorandum of agreement, and that its language imports that the respondent was to abstain from taking proceedings upon the judgment, if and when instalments to the amount of 2,090*l.* 19*s.* had been duly and regularly paid. Upon that assumption I am still of opinion that the respondent ought to prevail, on the simple ground that, in that view of the memorandum, her agreement to abate part of her claim was *nudum pactum*, for which the appellant gave no legal consideration.

I do not think it necessary to consider whether it would still be open to this House, if so advised, to overrule the doctrine of *Cumber* v. *Wane* (1) and *Pinnel's Case* (6), because I am not prepared to disturb that doctrine. Nor do I think it necessary to occupy the time of the House with a detailed explanation of the considerations which have led me to that result, seeing that I concur in the judgment of the Lord Chancellor and of my noble and learned friend opposite.

Lord FitzGerald.—The first question is as to the true construction of the memorandum of agreement of the 21st of December, 1876, and I express my opinion on it with the greatest diffidence. My excuse for expressing any opinion upon it is that I feel rather strongly on the point. The memorandum is, it may be observed, unilateral, for Dr. Foakes by it assumes no obligation.

The first recital is that Mrs. Beer had obtained a judgment against Dr. Foakes for a sum of 2,090*l.* 19*s.* The judgment would not *per se*, at common law, entitle the plaintiff to interest, but the statute of 1 & 2 Vict. c. 110, s. 17, provides "that every judgment debt shall carry interest at the rate of four pounds per centum per annum from the time of entering up the judgment . . . until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment."

This right to interest is different from interest arising on contract, or which a jury may give as damages or may withhold. It is a clear statutory right, arising immediately on entering up the judgment, and continuing until the judgment debt is

fully paid. The position of the parties at the date of the agreement then was, that Dr. Foakes owed Mrs. Beer the principal sum of 2,090*l.* 19*s.*, recovered by a judgment which carried interest at four per cent., arising *de die in diem* as a statutory right, and then (that is, at the time of the agreement) amounted to 113*l.* 16*s.* 2*d.*

The agreement then contains this recital: "And whereas the said J. W. Foakes has requested the said Julia Beer to give him time in which to pay such judgment, which she has agreed to do on the following conditions." He does not ask for any remission of any portion of his obligation; he solicits only time for payment, and she agrees to give him that time and no more.

It seems to me clear and free from doubt that "such judgment" in this recital would, if there was no more to guide us, mean the judgment debt with its statutable interest at four per cent. The language of the recital and of the whole agreement seems to be that of Mr. Smith, the defendant's solicitor, as we find in Mackreth's evidence this statement: "The agreement was prepared by Smith and sent to me, and I approved of it on behalf of Mrs. Beer."

Returning to the language of the agreement, it is remarkable that Dr. Foakes undertakes by it no obligation whatever; he does not bind himself to pay any instalment to her or to her "nominee," and it was not necessary that he should, for I can entertain no doubt that if what is called the "condition" for payment of the instalments had not been fulfilled, then Mrs. Beer could have enforced the whole residue of her demand for principal and the interest that accrued, by execution on the judgment. Dr. Foakes enters into no obligation to pay to her "nominee," and this seems to displace in fact the foundation of the judgment of the Divisional Court, where Mr. Justice Williams is reported to have said, "The doctrine is that an agreement to pay a less sum in satisfaction of a debt is without consideration. The English law forbids such an agreement. That is the law in its naked simplicity. But I think a very little departure from the mere agreement to pay a less sum will make the agreement good. If the creditor says, 'You owe me a large sum of money; I am willing to accede to your request for time, but you must enter into an agreement in writing, at your expense (as it would be), and you shall pay the money to me or to any person I may name at my election.' That I think is enough to make this agreement not a *nudum pactum*." There is no such thing in the agreement here. And Mr. Justice Mathew adds, "It is noticeable that the agreement is framed so that it casts an obligation which would not otherwise have existed. The agreement to pay the creditor's nominee renders it a document available as a security." It would seem, to me at least, that the terms of the agreement had never been properly conveyed to the minds of the Judges; for in fact Dr. Foakes assumed no greater obligation than the law imposed on him in respect of the judgment.

The expressed consideration is the payment to Mrs. Beer "of the sum of 500*l.* in part satisfaction of the said judgment debt of 2,090*l.* 19*s.*;" and again, I should repeat here that the last words would mean the debt, and the right to interest which it carried, if there is nothing subsequent to impose a different meaning. The term "satisfaction" is specially applicable to a judgment. You could not in former times plead payment simply to a *scire facias* on a judgment. The plea should shew satisfaction. The judgment would not be satisfied on payment of the 2,090*l.* 19*s.*, but only by payment of that sum and the interest. The agreement then provides, as a condition, for the payment of the instalments of 150*l.* "until the whole of the said sum of 2,090*l.* 19*s.* shall have been fully paid and satisfied." The whole difficulty arises on this passage. If in place of using the word "sum" it had used "judgment" or "judgment debt," in my opinion there could have been but one construction, namely, that "judgment" or "judgment debt" meant the principal sum of 2,090*l.* 19*s.*, with "interest at four per cent." Now, having regard to what the parties were at, why should we not read "the said sum of 2,090*l.* 19*s.*" by the light of the antecedent parts of the same agreement as meaning "the said judgment for 2,090*l.* 19*s.*," and thus do full and complete justice, and not deprive Mrs. Beer of

about 350*l.* as justly due to her as the 2,090*l.* 19*s.*, and which, it is to me manifest, she never intended and was never asked to relinquish? There is a special recital indicating what the parties intended—namely, "time on certain conditions"—but without a word as to relinquishing any part of the plaintiff's demand; and if the subsequent words are more general, we should limit and qualify them by the special language of the recital.

Dr. Foakes did not ask for any remission; he asked for time, and for time alone, and we ought to assume that when his solicitor prepared and furnished the memorandum of agreement he did not intend by its language that any part of Mrs. Beer's demand was to be released. Mackreth says that in the course of the negotiation "interest was never mentioned at all in reference to that agreement." She adopted the language of the memorandum, and it became hers; but was it such as to lead Dr. Foakes to understand that Mrs. Beer agreed, on performance of the condition, to give up her claim to interest?

I think that we ought not to adopt such a conclusion.

There are many authorities for the proposition that you may limit the general words of release by the antecedent recitals so as to effectuate that alone which was within the intention of the parties. I might refer to a number of cases—for example, *Thorpe* v. *Thorpe* (35), where it it is said *per cur.*: "Where there are general words only in a release they shall be taken most strongly against the releasor; . . . . but where there is a particular recital, and then general words follow, the general words shall be qualified by the special words."

Applying that rule to the present case, you may limit the general words at the conclusion of the memorandum to the giving of time alone, that is to say, if "judgment debt of 2,090*l.* 19*s.*" means the sum of 2,090*l.* 19*s.* and nothing more, then that Mrs. Beer agrees to give time for payment of the principal debt of 2,090*l.* 19*s.* by the instalments, and at the times indicated, and that, pending that arrangement, she "would not take any proceedings whatever on the said judgment." This would give effect to every word and leave the "interest" untouched, which, if the principal is to be paid by instalments, could not well be ascertained until the time had been reached for the payment of the last instalment. There is nothing in the memorandum, it should be observed, to prevent Dr. Foakes from coming in at any time and discharging the whole principal before the instalments became payable. Upon the construction of the memorandum, I am of opinion that the decision of the Court of Appeal should be affirmed.

The second question now presents itself; but with my view on the first it is not actually necessary for me to express any opinion on it, but it seems more satisfactory that I should do so. Assuming that I have fallen into error in interpreting the agreement, and that it is to be read that if Dr. Foakes should pay the actual sum of 2,090*l.* 19*s.* by instalments according to the condition, she would relinquish her statutable claim for interest and not issue execution on the judgment to recover it, is such an agreement *nudum pactum*, and therefore incapable of being enforced?

I have listened with much interest, and, I may add, with no small instruction, to the judgment of my noble and learned friend Lord Blackburn. He has as usual gone to the very foundation, and I regret that I have been unable to assist him in overturning the resolution of the Court of Common Pleas as reported by Lord Coke in *Pinnel's Case* (6), or in expunging from the books the infinitesimal remains of *Cumber* v. *Wane* (1). It seems to me somewhat doubtful whether the question arises which my noble and learned friend has presented—namely, whether payment of a part of a debt ascertained by judgment can be a satisfaction of the whole. In the case before us the whole of the 2,090*l.* 19*s.*, the principal of the judgment, has been paid to the last farthing.

The interpretation put by the Judges of the Courts below, and adopted by the Lord Chancellor and my noble and learned friend Lord Blackburn, on the memorandum, seems to me to divide it, in effect, into two stipulations, the first being that,

(35) 1 Ld. Raym. 235.

if Dr. Foakes should pay down 500*l.* and the remainder of the actual sum of 2,090*l.* 19*s.* in the manner prescribed, Mrs. Beer would so accept it, and, pending the payments, would take no proceeding on the judgment; and the second being that if the 2,090*l.* 19*s.* should be paid in the manner indicated, she would relinquish her claim for interest, and would not take any proceedings whatever on the judgment to enforce that interest. The question is, whether there is any sufficient legal consideration for the relinquishment of the debt for interest. I am clearly of opinion that there is not.

My noble and learned friend Lord Blackburn has shewn us very clearly that the resolution in *Pinnel's Case* (6) was not necessary for the decision of that case, and that the principle on which it seems to rest does not appear to have been made the foundation of any subsequent decision of the Exchequer Chamber or of this House, and, further, that some of the distinctions which have been engrafted on it make the rule itself absurd. But it seems to me that it is not the rule which is absurd, but some of those distinctions emanating from the anxiety of Judges to limit the operation of a rule which they considered often worked injustice. That resolution in *Pinnel's Case* (6) has never been overruled. For 282 years it seems to have been adopted by our Judges. During that whole period it seems to have been understood and taken to be part of our law that the payment of a part of a debt then due and payable cannot alone be the foundation of a parol satisfaction and discharge of the residue, as it brings no advantage to the creditor, and there is no consideration moving from the debtor, who has done no more than partially to perform his obligation. Though it may not have been made the subject of actual decision, yet we find that every Judge in this country who has had occasion to deal with the proposition states the law to be so. And in the sister country it has always been so received; and in the case of *The Corporation of Drogheda* v. *Fairtlough* (36), Chief Justice Lefroy thus expresses himself—I may say that his language is entitled to very considerable weight; he was a Judge who had sat at the feet of Lord Kenyon, and he was the well-known reporter of the decisions of Lord Redesdale. That very learned Judge thus states the law: "There is also a failure of evidence of consideration for the contract to remove the rule of the common law that payment of a less sum cannot be a satisfaction of a greater liquidated sum unless there is some further advantage accompanying the payment." And in another part of his judgment he puts the proposition thus: "The payment merely of a less sum, not being in pursuance of any contract by deed, cannot by the common law be deemed to be a satisfaction of a greater liquidated sum; but the law will allow the payment of a smaller sum to be a satisfaction of a greater liquidated sum if there be any collateral advantage, however small, to the creditor attending the transaction." The question did arise directly in that case, but the plea failed in other points, and it was therefore not necessary actually to decide it. I refer to it as shewing how a Judge of great experience considered the law to stand.

I am not aware of any decision that controverts this position, and the text-books uniformly present it thus: that "the payment of part of a liquidated and ascertained sum is in law no satisfaction of the whole." The proposition itself is but a part of a rule of our law which affects and governs many of the daily relations of life, *Nuda pactio obligationem non parit.* And again the law says that *nudum pactum est ubi nulla subest causa præter conventionem.*

I should hesitate before coming to a decision which might be a serious inroad on that rule, but I concur with my noble and learned friend that it would have been wiser and better if the resolution in *Pinnel's Case* (6) had never been come to, and there had been no occasion for the long list of decisions supporting composition with a creditor on the rather artificial consideration of the mutual consent of the other creditors. We find the law to have been accepted as stated for a great length of time, and I apprehend that it is not now within our province to overturn it.

The short question then is in relation

(36) 8 Ir. C. L. Rep. 98, 110, 114.

to a judgment debt payable immediately, and on which the creditor is entitled to have execution: Is the payment by the debtor of a part a sufficient consideration to support a parol agreement by the judgment creditor not to take any proceedings whatever on the judgment for the residue? In my opinion it is not; and I think, therefore, that the judgment of the Court of Appeal should be affirmed.

Order appealed from affirmed; and appeal dismissed with costs.

Solicitors—W. H. Hudson, for appellant; Bramall & White, for respondent.

[IN THE COURT OF APPEAL.]

1884. Oct. 30, 31. Nov. 10. } UZIELLI AND COMPANY *v.* THE BOSTON MARINE INSURANCE COMPANY.*

Ship and Shipping—Marine Insurance—Reinsurance—Notice of Abandonment—"Sue and Labour" Clause—"Factors, Servants, and Assigns."

In order to constitute a constructive total loss as between reinsurers and reinsured, notice of abandonment need not be given by the reinsured to the reinsurers, so long as notice is given under the original policy.

The ordinary "sue and labour" clause, whereby the assurers contribute in the event of the "assured, their factors, servants, and assigns," suing and labouring for the recovery of the ship, inserted in a reinsurance policy, does not enable the reinsured to recover from the reinsurers when the suing and labouring was done by the original assured.

Appeal from the judgment of Mathew, J., sitting without a jury, whereby it was adjudged that the plaintiffs recover from the defendants 1,120*l.* and costs.

The action was brought upon a policy of reinsurance dated the 14th of October, 1881, for 1,000*l.* of the steamer *Rose Middleton*, from the 1st of October, 1881, to the 31st of March, 1882, effected by the plaintiffs, on behalf of the Compagnie L'Armement de Paris, with the defendants against the perils ordinarily covered, subject to the same terms, clauses, and conditions as the original policy, and to pay as may be paid thereon, but to cover the risk of total loss only. The policy contained a "sue and labour" clause in the ordinary form—namely, that "in case of any loss or misfortune it shall be lawful to the assured, their factors, servants, and assigns, to sue, labour, and travel for, in, and about the defence, safeguard, and recovery of the said ship or any part thereof, without prejudice to this insurance, to the charges whereof the insurers will contribute each one according to the rate and quantity of his sum herein assured."

The Compagnie L'Armement de Paris, whose agents the plaintiffs were, had, by a policy dated the 17th of February, 1881, insured the *Rose Middleton* from the 20th of February, 1881, to the 20th of February, 1882, against the same perils for 1,500*l.*, with a "sue and labour" clause. There was also a policy of reinsurance, entered into with the underwriters at Lloyd's, of an original policy. The *Rose Middleton* was further insured with certain insurance clubs.

In or about the month of October, 1881, and during the risk, the *Rose Middleton* was wrecked. Notice of abandonment was given by the assured to the underwriters of the original policy; but no notice of abandonment was given to the defendants. Attempts were made on behalf of the insurers to get the ship off the rocks; considerable sums of money were expended, and eventually she was brought into port. After some negotiations a compromise was arrived at, the underwriters at Lloyd's and the insurance clubs paying eighty-eight per cent. on the value of the ship, and selling the ship for their own benefit. The expenses of getting the ship off the rocks and bringing her into port amounted to twenty-four per cent. of her value. The plaintiffs' principals accordingly paid the underwriters one hundred and twelve per cent. The cost of getting her off the rocks and of her repairs exceeded her value when repaired.

* *Coram*, Brett, M.R., Cotton, L.J., and Lindley, L.J.

Uzielli v. *Boston Marine Ins. Co.*, *App.*

Finlay, Q.C., and *J. Edge*, for the defendants.—The learned Judge had given judgment for the plaintiffs for one hundred and twelve per cent. of the amount for which the defendants insured the ship, on the footing that there was a constructive total loss, and that expenses were recoverable under the "sue and labour" clause. We say that there was no constructive total loss. The cost of getting off the rocks and repairs exceeded the repaired value; but the parties did not treat the ship as a constructive total loss, and there was no notice of abandonment. Notice of abandonment is necessary in the case of a reinsurance—*Phillips on Insurance*, s. 1506, and *Arnould on Marine Insurance* (4th ed.), p. 95. The "sue and labour" clause does not apply to a reinsurance.

They also cited *Aitchison* v. *Lohre* (1).

Cohen, Q.C., and *J. Gorell Barnes*, for the plaintiffs, as to the last point only.—The original underwriters who sued and laboured did so as the servants of the plaintiffs the second reinsurers. The words "to pay as may be paid thereon" impose the same liability on the defendants as that which the plaintiffs bore.

They cited *Whitworth* v. *Mackenzie* (2) and *Dixon* v. *Whitworth* (3).

Cur. adv. vult.

BRETT, M.R.—This action is brought to recover on a policy of insurance for a total loss. The judgment given is for 112 per cent. of the sum insured. The policy is a reinsurance policy entered into by reinsurers under another policy. The amount of risk accepted by the defendants is 1,000*l.* The defendants argue in the first place that there was no total loss. In that case there must be judgment for the defendants, because the policy is for a total loss only. Secondly, that there was no notice of abandonment, and therefore no constructive total loss. Thirdly, that the policy only covers the eighty-eight per cent. of the 1,000*l.*; and fourthly, that the plaintiffs cannot recover anything under the "sue and labour" clause. There was clearly a constructive total loss of the ship. The argument advanced on that point seems to answer itself. As to notice of abandonment, the assured did not give a notice; but the policy is between two subsequent insurers. It is amply sufficient to give notice of abandonment as between the first assurer and assured. What is the subject-matter of the policy? It is a reinsurance by reinsurers, and the subject-matter, in my opinion, is the ship. What is the plaintiffs' interest in the ship? They have no interest as owners; but sufficient interest under their policy of reinsurance. What is the extent of their interest? Suppose they had insured the ship to its full value, their loss might be more than the full value because of the "sue and labour" clause. Their risk is all they might pay under the policy. If they insured to the full amount and more—that is, to the extent of their interest—I should say that there would be no over-insurance, if they insured the value of the ship and what they might have to pay. But what was the interest which they have insured? They have insured 1,000*l.*, and stand their own insurers for the excess. If that be the nature of the policy they cannot recover more than one hundred per cent. of what they have insured. They can only recover more than one hundred per cent. if the suing and labouring clause applies. That makes it necessary to construe the "sue and labour" clause in this policy. The assured, their factors, servants, and assigns, may sue and labour, and the insurers are to contribute. The difficulty is as to the meaning of that clause in this policy. I am anxious to give it the largest interpretation. Where there is such a clause it is of advantage to all concerned throughout the series. But the suing and labouring were not done by them. They were done by Lloyd's Association, who are not their "factors, servants, nor assigns." If the word "agents" had been added I should have hesitated still more, but an agent is not allowed to appoint an agent. This is the common form of "sue and labour" clause, and it is not wholly sufficient for the purposes of a reinsurance upon a reinsurance. It is not as drawn applic-

(1) 49 Law J. Rep. Q.B. 123; Law Rep. 4 App. Cas. 755.

(2) 44 Law J. Rep. Exch. 81; Law Rep. 10 Exch. 142.

(3) 48 Law J. Rep. C.P. 538; Law Rep. 4 C.P. D. 371.

able to a reinsurance upon a reinsurance. The judgment must therefore be varied to the extent of making it for 1,000*l.* The total loss and the constructive total loss were all contested before the learned Judge; but this point was not argued. It was elaborately argued here, and I think counsel have no right to slur over in the Court below points which they argue here. The respondents have substantially succeeded, so we dismiss the appeal, with costs.

COTTON, L.J.—I agree. As to the total loss I add nothing. It is said that notice of abandonment ought to have been given; but notice was properly given to the original insurers. Can it be necessary that notice should be given to second reinsurers? The insurers could not give such notice without accepting the abandonment. This is a contract of insurance on the ship. The conditions of the policy shew that it is an insurance on the ship by those who have no interest as owners; but their interest is under their own policy. Their interest is in respect of the interest of the first reinsurers. What is the extent of their liability? 1,000*l.*—to "pay as may be paid thereon," but for a total loss only. It is not limited to eighty-eight per cent. Total loss has occurred, and they are liable to pay to the extent of 1,000*l.* properly paid by the French company. That is under the body of the policy. As to the "sue and labour" clause, it is said that the French policy adopts the acts of Lloyd's. In my opinion, that is not so. No additional burden can be made out of the "sue and labour" clause beyond the 1,000*l.* As to costs, I agree with the Master of the Rolls, because the point was not properly raised below.

LINDLEY, L.J.—It was said first that there was no total loss; but the evidence on this subject was too clear. Secondly, that there had been no notice of abandonment; but it seems settled that no notice of abandonment is required. The decisions in America go to that extent. In *Hastie* v. *De Peyster* (4) Chief Justice Kent and Mr. Justice Livingston so decided, and since then it has been accepted as law. The present plaintiffs are therefore entitled to recover something. How much? They say one hundred and twelve per cent. The defendants say eighty-eight per cent. I doubt whether by any construction the "sue and labour" clause could be brought into operation; but the other clauses give the plaintiffs a right to recover all their risk to the extent of 1,000*l.*

Judgment varied.

(4) 3 Caines, N.Y. Sup. Ct. 190.

Solicitors—Waltons, Bubb & Walton, for plaintiffs; Lowless & Co., for defendants.

[IN THE COURT OF APPEAL.]

1884. Oct. 25.

BRYSON *v.* RUSSELL.*

Practice—Special Venue—Notice of Action—Constables—Extent of Special Constables' Privileges conferred on County Constables—1 *&* 2 *Will.* 4. *c.* 41. *s.* 19—2 *&* 3 *Vict. c.* 93. *s.* 8—*Contagious Diseases* (*Animals*) *Act*, 1878 (41 *&* 42 *Vict. c.* 74).

Constables appointed under the County Constables Act (2 *&* 3 *Vict. c.* 93), *to whom in virtue of section* 8 *all the provisions of the Special Constables Act* (1 *&* 2 *Will.* 4. *c.* 41) *are to be "deemed to extend," have the privilege of special venue and notice of action conferred by section* 19 *of the Special Constables Act on "persons acting in the execution of this Act" only when acting in the execution of the Special Constables Act, and not when acting in the execution of other Acts, e.g. the Contagious Diseases* (*Animals*) *Act*, 1878.

Appeal of the defendants from the judgment of Day, J., and Smith, J., upon points of law arising on the pleadings.

The action was for detinue and conversion of cattle. The defendant pleaded that the acts complained of were done by him as Superintendent of Police for the County of Cumberland, in the execution of the Acts

* *Coram* Brett, M.R., Bowen, L.J., and Fry, L.J.

1 & 2 Will. 4. c. 41, 2 & 3 Vict. c. 93, and 41 & 42 Vict. c. 74 (the Contagious Diseases Act, 1878); that the venue was not laid in the county in which the acts were committed, and that he had had no notice of action.

By section 19 of 1 & 2 Will. 4. c. 41, entitled "An Act for amending the Laws relative to the appointment of Special Constables, and for the better Preservation of the Peace," it is provided that, "for the protection of persons acting in the execution of this Act, be it enacted that all actions and prosecutions to be commenced against any person for anything done in pursuance of this Act, shall be laid and tried in the county where the fact was committed," and a calendar month's notice of action must be given. The duties of the special constables appointed under this Act were (section 1) to "cause the peace to be kept and preserved, and to prevent all offences against the persons and properties of his Majesty's subjects."

By section 8 of 2 & 3 Vict. c. 93, entitled "An Act for the establishment of County and District Constables by the authority of Justices of the Peace," "the chief constable and other persons so appointed shall have all the powers, privileges, and duties which any constable has by virtue of the common law, or of any statute made or to be made, and every provision of 1 & 2 Will. 4. c. 41 shall be deemed to extend to the constables appointed under this Act," with certain immaterial exceptions.

By section 50 of the Contagious Diseases (Animals) Act, 1878 (41 & 42 Vict. c. 74), the police in each district are required to enforce the Act, and a constable may, among other things, stop, detain, and examine animals, to which an offence or suspected offence relates. By section 55, an action against any person for any act done in execution of the Act shall not lie unless within four months after the act complained of.

The Divisional Court disallowed the defence.

R. O. B. Lane, for the defendant.—Every provision of the Special Constables Act (1 & 2 Will. 4. c. 41) is, by virtue of section 8 of the County Constables Act (2 & 3 Vict. c. 93), "deemed to extend" to the constables appointed under the County Constables Act, under which Act the defendant was appointed. Section 19 of the Special Constables Act is one of these provisions, and it furnishes the protection of the plea in question to persons acting under "this Act." "This Act," when the section was passed, meant the Special Constables Act; but by incorporation into it of the powers of County Constables, it now includes all the Acts under which he is empowered to act, and among them the Contagious Diseases (Animals) Act, 1878.

E. Ridley, for the plaintiff, was not called upon.

BRETT, M.R.—This is a question of the grammatical construction of English. The act done is in pursuance of a duty imposed by the Contagious Diseases (Animals) Act. The defendant is appointed under the County Constables Act. I assume that for many things which he may do he has the protection of the Special Constables Act. Has he that protection for what he does under the Contagious Diseases (Animals) Act? What is the protection given by the Special Constables Act? Read as applicable to this constable who has various duties, it is for anything done under the Special Constables Act, although he is not appointed under the Special Constables Act. The words "anything done under this Act" are in the Special Constables Act comprehensive words. If the things were enumerated they would include all the offences in respect of which the constable might take action under that Act. But that enumeration will not include the offences for which he might take action under the Contagious Diseases (Animals) Act. The case is just the same as if all the offences under the Special Constables Act had been enumerated in the County Constables Act, and the protection in question is given in respect of those offences and those only.

BOWEN, L.J.—We have to give effect to a simple word of relation in the English language. We are asked to make "this" mean something else, which we cannot do, whether the result was designed by the Legislature or unintentional.

Bryson v. *Russell, App.*

FRY, L.J.—I am of the same opinion. The County Constables Act inserts for the protection of county constables the provisions of the Special Constables Act; but the actual provisions only are insertod, and they cannot be extended by analogy.

Appeal dismissed.

Solicitors—Bell, Brodrick & Gray, agents for L. C. & H. F. Lockhart, Hexham, for plaintiff; J. L. Morris, agent for Carrick Lee & Sons, Brampton, for defendant.

1884. Dec. 16. LINE AND OTHERS (*petitioners*) *v.* WARREN, CHECKLEY, AND BROMWICH (*respondents*).

Municipal Election—Objection to Candidates—Nomination Papers—Municipal Corporations Act, 1882, *schedule* 3, *part* 2, *rules* 3 *and* 10—*Presentation of Petition not affecting whole Election.*

At an election to fill four vacancies in the town council of D. the three respondents and H. were returned as duly elected. The election of the respondents was subsequently petitioned against on behalf of three other candidates, who were prevented from going to the poll owing to objections to their nominations having been allowed by the mayor. These objections were that the persons subscribing the nomination papers had also subscribed other nomination papers of candidates at the election, although it was admitted that none of such persons had subscribed more nomination papers than there were vacancies to be filled, nor more than one nomination paper for any one candidate. A similar objection was raised to the nomination of H., but was allowed by the mayor to be withdrawn:—Held, *that the decision of the mayor in allowing the objection was wrong, and that a petition could be presented against the return of the three respondents without making H. a party to the proceedings.*

This was a Special Case stated pursuant to the order of Field, J. The following were the material facts:—

At the election of four councillors to fill four vacancies in the council of the borough of Daventry, appointed to be holden on the 1st of November, 1883, the three respondents and one Thomas Harris were declared duly elected. A petition was subsequently presented by the petitioners against the election, on behalf of John Merrifield, John Edward Rodhouse, and Charles Rodhouse, who had been prevented going to the poll in consequence of certain objections to their nominations being allowed by the mayor of Daventry at a sitting held by him on the 25th of October, 1883, for the purpose of deciding upon the validity of objections to the nominations of the several candidates.

At the said sitting, held pursuant to notice, an objection was raised on behalf of the respondents to the nomination papers delivered on behalf of the said Thomas Harris, on the ground that the persons subscribing his nomination paper had also subscribed other nomination papers of candidates at the said election, notwithstanding that it appeared that none of the burgesses had subscribed more nomination papers than there were vacancies, nor yet more nomination papers than one of any candidate. The like objection was taken by and on behalf of the same persons to the nomination papers of John Merrifield, John Edward Rodhouse, and Charles Rodhouse.

The mayor endeavoured to find out which of the nomination papers was first delivered, but was unable to do so, inasmuch as it appeared that the nomination papers had all been delivered together at the same time and rolled round in a bundle. He therefore allowed the objections to the nomination papers of John Merrifield, John Edward Rodhouse, and Charles Rodhouse, and refused to allow them to become candidates or to publish their names as candidates at the elections; at the same time the mayor permitted the objection to the nomination paper of Thomas Harris to be withdrawn.

The petitioners petitioned against the return of the respondents, praying that it might be determined that they were not duly elected, and that their said election and return was wholly null and void; but the petitioners did not pray that it might be determined that the said Thomas Harris

was not duly elected, and that his election and return were null and void.

The respondents contended that the petition had not been presented in the prescribed manner, and did not contain such statements and matters as are prescribed by the 4th rule of the General Rules made in 1883 for the effectual execution of part 4 of the Municipal Corporations Act, 1882, because the said petition did not pray that the election be declared void, but only prayed that it might be determined that the respondents, who are three out of four persons elected, were not duly elected, and that their election was wholly null and void, and because the relief or remedy prayed for could not be granted without declaring the whole election void, which could not be done in the absence of Thomas Harris, who was elected at the said election, inasmuch as the said Thomas Harris had not been made a party to the proceedings.

The 4th rule of the General Rules mentioned in the last preceding paragraph is as follows:—"The petition shall conclude with a prayer, as, for instance, that some specified person should be declared duly returned or elected, or that the election should be declared void, or that a return may be enforced (as the case may be), and shall be signed by all the petitioners."

The questions for the consideration of the Court were—

1. Whether the election of the respondents under the circumstances mentioned could be questioned by petition in the absence of the said Thomas Harris, who was elected at the said election, and who had not been made a party to these proceedings.

2. Whether in the circumstances above mentioned the respondents were duly elected and returned.

Yarborough-Anderson (*Shearman* with him), for the petitioners.—The mayor was clearly wrong in allowing the objections made to the nomination papers of Merrifield, J. E. Rodhouse, and C. Rodhouse. Rule 3 in part 2 of the 3rd schedule to the Municipal Corporations Act, 1882, expressly says that a burgess "may subscribe as many nomination papers as there are vacancies to be filled"; and rule 10, which says that "where a person subscribes more nomination papers than one, his subscription shall be inoperative in all but the one which is first delivered," must be read in such a way as not to conflict with rule 3. The respondents, therefore, were not duly elected.

Lewis Coward, for the respondents, was called upon.—The Court cannot, even if the mayor was wrong in allowing the objections to those nomination papers, declare that the respondents were not duly elected, for that could only be on the ground that the whole election was null and void; and the election cannot be adjudged null and void in the absence of Harris, who was also returned as elected, and who is not before the Court. By section 93, sub-section 4, it is enacted that, at the conclusion of the trial of an election petition, "the election Court shall determine whether the person whose election is complained of, or any and what other person was duly elected, or whether the election was void"; but the Court could not determine that Harris was duly elected, if of opinion that the decision of the mayor in allowing the objection to three of the nomination papers was wrong. It appears from *Budge* v. *Andrews* (1) that the Court may adjudge an election wholly void, not merely upon a petition questioning it on the ground of bribery or the like, but also upon a petition under section 87, subsection 1, questioning it on the ground that the person whose election is questioned was not duly elected by a majority of lawful votes; and clearly the election cannot be adjudged void in the absence of Harris.

He referred also to *Howes* v. *Turner* (2) and to rule 14 of the rules in part 2 of schedule 3 of the Municipal Corporations Act, 1882.

MATHEW, J.—Our judgment in this case must be for the petitioners. The mayor was, no doubt, wrong in deciding that rule 10 had any application to a case like the present, for it clearly does not where several vacancies had to be filled. The

(1) 47 Law J. Rep. C.P. 586; Law Rep. 3 C.P. D. 510.

(2) 45 Law J. Rep. C.P. 550; Law Rep. 1 C.P. D. 670.

Line v. *Warren.*

questions we are asked are, first, whether the election of the respondents can be questioned by petition in the absence of Thomas Harris, who was elected at the election, but who has not been made a party to the proceedings; and, secondly, whether the respondents were duly elected and returned? The second question has been practically abandoned; and it has not been seriously contested that the respondents were not duly elected. The real contention has been that the objection which applies to the respondents' election equally applies to that of Thomas Harris, and that the Municipal Corporations Act, 1882, does not allow a petition to be presented against the election of some and not all. The petition must, it has been urged, deal with the whole election; but this seems to me to be a fallacy. No petition has been lodged against the return of Harris; and our sole duty is to deal with the respondents' return which is petitioned against.

It seems to me that Harris was, under the circumstances, duly elected; but even if he was not, there is no obligation on our part to go outside the petition which has been presented.

The case of *Howell* v. *Turner* (2) has no application, for there all the persons were petitioned against and the whole election declared void. The other case seems to me to be equally remote from the present one.

DAY, J., concurred.

Judgment for the petitioners.

Solicitors—Caister & Shearman, for petitioners; Kingsford, Dorman & Co., agents for Burton & Willoughby, Daventry, for respondents.

IN THE HOUSE OF LORDS.]

1884. Nov. 4.

WILLIAMS *v.* MERCIER.

Husband and Wife—Marriage Settlement—After-acquired Property—Become entitled during the Coverture—Wedding Presents.

By a marriage settlement executed the day before and in anticipation of a marriage solemnised on the 22nd of March, 1881, *it was declared that all property to which the wife or the husband in her right at any time during the coverture should become entitled, whether in possession, reversion, or otherwise (except jewels, d'c., which were to belong to the wife for her separate use, and except property acquired at one time not exceeding* 300*l. in value), should be settled upon certain trusts. A subsequent clause in the settlement referred to the trusts thereinbefore declared and contained concerning such part of the personal estate to which the wife then was or she or the husband in her right should become entitled as aforesaid as should consist originally of money. There were no trusts thereinbefore declared relating to any property to which the wife was then entitled, unless such property was included in the declaration above mentioned:*—Held, *that jewels which, being the property of the wife before the marriage, vested in the husband eo instanti of the marriage, were property to which he became entitled in her right during the coverture within the meaning of the settlement, and consequently by force of that instrument belonged to her for her separate use.*

This was an appeal from a decision of the Court of Appeal reported 51 Law J. Rep. Q.B. 594; Law Rep. 9 Q.B. D. 337.

Judgment was recovered by the respondent, Madame Marie Mercier, against Mrs. Hwfa Williams, the wife of the appellant (the appellant not being joined), for debts incurred before her marriage. The sheriff seized in execution certain jewels as belonging to Mrs. Williams. The appellant claimed the jewels as his property, and an interpleader issue was directed to try the question whether they belonged to him as against the judgment creditor.

On the trial it appeared that the jewels had been the property of Mrs. Williams

before her marriage to the appellant, the greater part being wedding presents.

A marriage settlement had been executed on the 21st of March, 1881, in contemplation of the marriage solemnised the following day between Mr. and Mrs. Williams. No specific property of Mrs. Williams was settled, but the settlement contained the following declaration :— "And it is hereby agreed and declared that all real and personal property to which the said Florence Farquharson or the said Thomas Anthony Hwfa Williams in her right at any time during her now intended coverture shall become entitled, whether in possession, reversion, or otherwise (except jewels, trinkets, ornaments of the person, plate, linen, china, furniture, pictures, prints, books, and artic'es of the like nature, which it is hereby declared shall belong to the said Florence Farquharson for her separate use, and except also any legacy or other property acquired at one and the same time, not exceeding in amount or value the sum of 300*l.*), shall, as soon as circumstances will admit, and at the cost of the trust estate, be assured and transferred by the said Thomas Anthony Hwfa Williams and Florence Farquharson respectively, and all other necessary and proper parties (if any), unto or otherwise vested in the trustees or trustee: Upon trust that the trustees or trustee shall at such time or times, and in such manner as they or he shall think fit (but as to reversionary property not until it shall fall into possession, unless it shall appear to the said trustees or trustee that the capital of the trust estate will probably be injured by deferring the sale), sell and call in and convert into money such part or parts of the said property as shall not consist of money or of investments of the nature hereinbefore authorised, and shall, with the consent in writing of the said Thomas Anthony Hwfa Williams and Florence Farquharson during their joint lives, and of the survivor of them during his or her life, and after the decease of such survivor at the discretion of the trustees or trustee, invest the moneys which shall come into their hands by such sale, calling in, or conversion as aforesaid, in or upon the stocks, funds, and securities in or upon which the trust funds are hereinbefore authorised to be invested, or of an annuity or annuities or other estate or interest for the life of the said Florence Farquharson, and shall stand possessed of the said stocks, funds, and securities upon the trusts, and with and subject to the powers and provisions next hereinafter declared and contained concerning the same; and in the meantime, so long as any property hereinbefore directed to be sold shall remain unsold, shall pay the rents and income thereof to the person or persons and in the manner and to whom and in which the income of the same shall for the time being be payable or applicable under the trusts next hereinafter declared and contained. And it is hereby declared that the said trustees and trustee shall stand possessed of and interested in the said last-mentioned stocks, funds, and securities upon the trust following (that is to say): Upon trust to pay the income thereof to the said Florence Farquharson during her life, and so that during her coverture the same shall be for her sole and separate use, and she shall not have power to dispose thereof in the way of anticipation; and after her decease, upon trust that the said trustees or trustee shall pay and apply any annuity or annuities and the income of any other estate or interest for the life of the said Florence Farquharson, or for any term or period determinable on her death, to the persons for the purposes and in the manner to whom and for and in which the income of the said last mentioned stocks, funds, and securities should or would for the time being be applicable under the same trusts; but with power for the said trustees or trustee, with the consent in writing of the said Florence Farquharson, at any time to sell the same in such manner as they or he shall think fit, so nevertheless that the money to arise from such sale be held and applied upon the trusts and with and subject to the powers, provisoes, agreements, and declarations hereinbefore declared and contained concerning such part of the personal estate of or to which the said Florence Farquharson now is or she or the said Thomas Anthony Hwfa Williams in her right shall become possessed or entitled as aforesaid, as shall consist originally of money."

Williams v. *Mercier, H.L.*

Lord Coleridge, C.J., before whom the issue was tried, directed the jury that the goods were the property of the appellant. A rule *nisi* for a new trial obtained in a Divisional Court was discharged, the Judges being divided in opinion (Mathew, J., against; Cave, J., in favour of the rule).

It was assumed at the trial and in the Divisional Court that the settlement did not affect the property in the jewels.

In the Court of Appeal, Jessel, M.R., and Lindley, L.J., reversed the decision of the Court below, and directed a verdict and judgment for the execution creditor, on the ground that the jewels became the separate property of Mrs. Williams by force of the settlement.

On the appeal to the House of Lords the question of the effect of the settlement was first argued by the appellant's counsel, and on the view taken by the House it became unnecessary to proceed with any further argument as to the property in the jewels independently of the settlement.

Sir H. Giffard, Q.C., and *Chester*, for the appellant.—The settlement of after-acquired property and the exception therefrom only apply to property acquired after the marriage, during the coverture, not to property which was the wife's before the marriage and vested in the husband at the moment when the coverture commenced. Had property in existence at the time been intended to pass, it would have been expressly settled; but the intention was evidently to settle something future and contingent. Personal property of the wife which vests in the husband on the marriage is not appropriately described as coming to him "in her right." Those words refer rather to real estate and chattels real and to *choses in action* which are reduced into possession after the marriage. The settlement is in the ordinary form which has been the subject of judicial interpretation. It must be admitted that the earlier decisions do favour the construction adopted by the Court of Appeal—*Graffiey* v. *Humpage* (1), *James* v. *Durant* (2), and *Blythe* v. *Granville* (3). But the current of later authorities is the other way—*Hoare* v. *Hornby* (4), *Otter* v. *Melvill* (5), *Ex parte Blake* (6), *Churchill* v. *Shepherd* (7), *Atcherley* v. *Du Moulin* (8), *Wilton* v. *Colvin* (9), *Archer* v. *Kelly* (10), *Rose* v. *Cornish* (11), *In re Pedder's Settlement Trusts* (12), and *In re Clinton's Trusts* (13). The only exception in recent times is *In re Viant's Settlement Trusts* (14), where Bacon, V.C., uses words expressing approval of the older cases; but there was no decision on the point now in question, and the judgment was strongly disapproved by Jessel, M.R., in *In re Jones's Will* (15).

It is usual for conveyancers expressly to include in covenants of this nature property of which the intended wife is possessed at the date of the settlement. Probably this settlement was originally drawn in the ordinary form, and the words referring to present property were struck out because it was intended to exclude such property. But the subsequent reference in the power of sale was *per incuriam* allowed to remain unaltered.

Warmington, Q.C., and *F. O. Crump*, for the respondent, were not called upon.

THE LORD CHANCELLOR (EARL OF SELBORNE).—This case has been ably argued, and all has been said which I think could possibly be said upon the argument of the particular question on which the Court of Appeal proceeded. We have not to determine the question what would have been the position of this jewellery for the purpose of the interpleader issue if the matter had stood as it was supposed to stand in the Queen's Bench Division.

(1) 1 Beav. 46; 8 Law J. Rep. Chanc. 98.
(2) 2 Beav. 177.
(3) 13 Sim. 190; 12 Law J. Rep. Chanc. 82.
(4) 2 You. & C. 121; 12 Law J. Rep. Chanc. 151.
(5) 2 De Gex & S. 257; 17 Law J. Rep. Chanc. 345.
(6) 16 Beav. 463.
(7) 33 Beav. 107.
(8) 2 Kay & J. 186.
(9) 3 Drew. 617; 25 Law J. Rep. Chanc. 850.
(10) 1 Dr. & S. 300; 29 Law J. Rep. Chanc. 911.
(11) 16 Law Times, N.S. 786.
(12) 40 Law J. Rep. Chanc. 77; Law Rep. 10 Eq. 585.
(13) 41 Law J. Rep. Chanc. 191; Law Rep. 13 Eq. 295.
(14) 43 Law J. Rep. Chanc. 832; Law Rep. 18 Eq. 436.
(15) 45 Law J. Rep. Chanc. 429; Law Rep. 2 Ch. D. 362.

Nothing therefore which we may now say will bear one way or the other upon that question which was determined by Lord Coleridge and by Mr. Justice Mathew. It was supposed before the Queen's Bench Division and at the trial that this settlement did not affect this property.

In the Court of Appeal the settlement was examined, and the Court unanimously thought, and apparently without any doubt or hesitation, that the settlement decided this question, and vested the jewellery in the wife for her separate use, and consequently that the creditor was entitled to have execution against these jewels.

Now, so far as the facts are concerned, the evidence appears to me to point to a title acquired by the wife before the marriage, if not to the whole, at all events *prima facie* to the whole of this property, the greatest part of it being in the shape of presents given by friends, and some by the husband, in anticipation of the marriage, a smaller part by some earlier title. So that for the purpose of the present question it may be taken, I think, as property which belonged to her as a *feme sole* before her marriage; and I think that no distinction in that respect which is satisfactory can be drawn, at all events for the purpose of the construction of this instrument, between those articles which had been given by friends as presents in expectation of the marriage and those articles which she had otherwise. Nor do I think that there is any difference between articles given by the husband and articles given by other friends; because if given before the marriage, there being no evidence of any condition attached to the gift of them, I take it that in point of law they were hers, subject of course to the effect of the marriage when it took place, and subject of course to the effect of this deed of settlement which was executed before the marriage.

The Court of Appeal held that in that situation these jewels belonged to the wife, under the express terms of the settlement, for her separate use; and beyond all doubt that decision is correct if they are within the exception, because the exception is of all "jewels, trinkets," and so forth, "which it is hereby declared shall belong to her for her separate use." But then the exception is from a covenant which as to things not excepted would be operative to settle that to which the covenant applies; and it is argued, and I will for the present purpose assume that, *prima facie* at all events, it is rightly argued, that nothing is excepted which but for the exception would not have come within the antecedent words of the description—that is to say, which would not but for the exception have been under those antecedent words a subject of settlement. Well, what are those antecedent words?—"It is hereby agreed and declared that all real and personal property to which the said Florence Farquharson or the said T. A. H. Williams in her right at any time during her now intended coverture shall become entitled, whether in possession, reversion, or otherwise," shall be settled.

Now, let us for a moment look at those words as they stand by themselves, and without reference to any of the authorities. It is to be observed that there is there a perfect generality as to the subject—"all real and personal property"—without the addition of any words which will assist the construction as shewing by what sort of title that property was to become the wife's. In some of the cases the words "devise," "descent," and so on, or other words occur which, whether of greater or less weight, may at all events have been of some weight in assisting the construction and tending to shew that an after-acquired title alone was in view. If those words are of importance for that purpose they do not occur here.

Again, there is an exception of jewels and so forth; and as far as the nature of that exception and the intention indicated by it go, it certainly does not seem obvious that the principle on which such an intention would proceed as to after-acquired "jewels, trinkets, ornaments of the person, books, and articles of the like nature," and some other things, might not extend as much to presents of that kind given by the husband or friends in contemplation of the marriage, or already in possession of the wife, as to those things which might be given afterwards. I am not aware that in any of the authorities which have been referred to there is any exception of that

kind calculated to give any assistance in the investigation of the intention.

There is nothing here indicating an intention not to include in the covenant property then vested in the wife, and there is something which is not found in other cases which, at least in its principle, would be consistent with an intention to include it—that is to say, to include in the exception the things of the same sort of which she was already possessed as well as those which might come to her afterwards. Still, if the words are not, in their proper, literal, and grammatical construction, capable of being applied to that to which she was already entitled, that which I have said might be an insufficient reason for holding that they do so apply. But can it possibly be said, upon any sound principles of construction, that the words are incapable of being so applied? What are they?—"All real and personal property to which the said Florence Farquharson or the said T. A. H. Williams in her right at any time during her now intended coverture shall become entitled." If the wife only had been mentioned, if it had been "to which she at any time during her now intended coverture shall become entitled," they would have been words of futurity, exclusive of the title already vested in the wife. That was the case in some of the authorities, and the argument would have been strong, if it had been so here, that there were not words to cover what she was already entitled to. But the words do not relate to the wife only; they relate to her or her intended husband in her right. He at all events had no title, at the time at which this instrument was made, to anything which belonged to her, and if he acquired a title it was a future title; and the only question would be whether it was in her right and whether it was acquired by him during the then intended coverture. Well, it was in her right, I conceive, for when the wife's property is transferred to the husband he is subrogated to the right which she had before. He does not claim it in an original right of his own; he claims it in that which was an original right of his wife, of which he is now, by virtue of his marital title, to obtain the benefit. The words "in her right," therefore, are, in my judgment, capable of being properly, sensibly, and grammatically applied to property of this description, to which the husband might become entitled by reason of the marriage.

Then the question would be whether the words "at any time during her now intended coverture" would apply. Surely you cannot exclude from the duration of the coverture the first moment of its inception any more than you can the last moment of its continuance. The moment that the marriage is complete by the performance of that which makes the parties husband and wife, that moment the coverture begins; and if at that moment he becomes entitled as her husband in her right, I am totally unable to say that it is not during the intended coverture in a sense which the words will rightly, grammatically, and reasonably bear.

Now far be it from me to say that a context or an intention discovered from those extrinsic facts and circumstances which are legitimately to be taken into account might not lead to the conclusion that what was meant was only that property which the wife shou'd afterwards acquire, and in which the husband should succeed to the rights or become subrogated to the rights so afterwards acquired by her. Many circumstances would justify such a conclusion. Authorities have been referred to in which such a conclusion was arrived at. I will mention one of them by way of illustration only—such a case as *Hoare* v. *Hornby* (4), where all the parties were contracting with each other with equal knowledge that the wife was then entitled under two known wills, the one English and the other American, and they expressly made the settlement of the property under the English will, and said nothing whatever about the American, and there was a general covenant of this sort in words of futurity. I think it is a very reasonable thing at all events, and not surprising, even if the words "if any," which are words of uncertainty, had not been added, to construe that as meaning only what the husband should acquire a right to by reason of an after-acquired title of the wife.

It is not necessary to go through the cases or to express any opinion upon them,

but it is probable that in other cases in which a similar conclusion was arrived at the reason was the same. If the words are capable of the sense of which I think they are capable, and which in some of the authorities has been placed upon similar words, whether those authorities are rightly decided or not, still the question for your Lordships is whether that is the true sense of the words in this settlement; and that is to be ascertained, not from a context of words more or less similar in some other settlement, but from the whole contents of this settlement. I am of opinion that the words are capable of such a sense. I do not say that they bear it so clearly that that sense might not be repelled by a context, or even by extrinsic circumstances looked at in connection with the context, which would tend to repel it; but what we have to consider is what we have here. Looking at the immediate context only, as far as I can form an opinion, I think that there might be something to be said on both sides; but certainly the construction is not repelled by any words which would exclude these articles. And we find later on in the same instrument words which appear to me most plainly and expressly to shew that it was meant to include these things—words which must be rejected if these things are not included; because, in a clause referring to this very covenant or part of the agreement, it is said that certain sales may take place of securities to arise under this very portion of the settlement, and then that "the money to arise from such sales shall be held and applied upon the trusts and with and subject to the powers, provisoes, agreements, and declarations hereinbefore declared and contained concerning such part of the personal estate of or to which the said Florence Farquharson now is, or she or the said T. A. H. Williams in her right shall become possessed or entitled as aforesaid." Those words "now is" are unambiguous, and they declare expressly that in the view of the parties the previous powers, provisoes, agreements, and declarations as to the wife's property relate not only to property which shall come to her or to her husband in her right by a future title, but also to property of which she at that very time was possessed or to which she was entitled. Whether or no the draftsman intended to have similar words in the previous clause is a point upon which your Lordships can have no legitimate means of information. But, supposing that he did not, supposing that you are to take, as probably you ought to take, the instrument simply as it stands, the first words to which I have referred are, in my judgment at least, susceptible of a construction—a reasonable and grammatical construction—which would include the property to which this lady was at that time entitled; and those words which occur in the later part of the settlement expressly say that all the parties to the instrument execute it upon the understanding and with the intention that the covenant shall have that effect.

I therefore conclude that the judgment of the Court of Appeal is right and ought to be affirmed, and the appeal dismissed with costs, and I move your Lordships accordingly.

LORD BLACKBURN.—I am of the same opinion. I think the sole question is, What is the meaning of this particular settlement in the words and the manner in which the settlement has been drawn? I do not think that there can be any doubt that it was competent to the parties, if they had pleased, if by apt words they had expressed it and shewn an intention to do so, to have said that the property which belonged to Florence Farquharson before her marriage, and which would, if there had been no provision to the contrary, have upon her marriage become her husband's by virtue of the marriage, should not come to her husband, but should be settled, either the whole or any part of it, to her separate use or to some other purpose.

Now the first question is, do these words here used mean that? I think myself that if there had been nothing more in them than this, "It is hereby agreed and declared that all real and personal property to which the said Florence Farquharson shall become entitled during her now intended coverture," they would not have included that which was already hers. The words then would have meant that which would be future property, what she would become afterwards entitled to. But

it is said "or the said T. A. H. Williams in her right at any time during her now intended coverture shall become entitled." There arises a considerably more difficult question, to say upon the face of it what that means. When the wife by marrying the husband caused the property which was hers to become his, I cannot bring myself to doubt that in one sense of the words he did become entitled to it in her right, and he became entitled to it in her right at the one indivisible instant when the coverture commenced; and I think that the words "at any time during her now intended coverture" might apply to those things which became vested in him, became his in her right, at the very instant when the coverture commenced, and contemporaneously with it. It is something like the old case (*Hales* v. *Petit* (16)) which was so much discussed in *Plowden's Commentaries*, whether a man who committed suicide forfeited the property by having killed himself during his lifetime or not. The indivisible instant when he became dead is, I think, like the indivisible instant when the coverture commenced, which might, I think, be included under the words in the instrument "at any time during her now intended coverture."

At the same time I think that that is by no means the clear and obvious construction, and I think that a very little circumstance may shew that it was not intended to include that, but was intended to be confined to things *in futuro* altogether, to such property as she might acquire afterwards. It does, no doubt, at the first blush seem an injudicious thing (and I would certainly say that if the parties had thought of it they would have provided against it) to say that when the bride expects that some friend is going to leave her a legacy, if that friend dies within a short time before the marriage is actually celebrated, the husband shall take it, but if he dies an hour afterwards when the marriage has actually taken place, it shall be settled. Nevertheless, although the parties would have been very injudicious in so wording the instrument, they may have done it so as to have embraced that case.

(16) Plowd. 257.

In the cases which have been cited there was always something which tended to shew that it was not intended to include property which was the intended wife's property already. What it was differs in different cases. I should say myself that where it appears that the parties, well knowing that she had property, settled a part of it, leaving another part unsettled, that would be a reason for saying that they mean to use the words in the more extended sense. In a case where they knew that there was some property of the bride's, and did not say anything about it, I am by no means clear what one ought to say. The authorities seem to be such upon the whole as tend to shew that the settlement should be taken to apply only to property which should come *in futuro* to the wife, and not to that which was hers before. But I do not say anything about how that would be, further than this, that I think a conveyancer drawing a settlement of this kind would do well to use a word or two to shew what was intended in order that there should be no doubt about it. Such a word or two ought, in my opinion, to have been used in the present case. If the words which were inserted later—namely, all property "of or to which the said Florence Farquharson now is, or she or the said T. A. H. Williams in her right shall become possessed or entitled"—had been inserted in the earlier declaration, there could not have been a doubt that it was intended that all her property, both what is hers now and what shall come to her at any time after her marriage, shall be settled upon trustees for the benefit of the wife and children.

There might have been something to shew that the parties purposely left them out, or that the intention was that they should not be introduced at that point. But nothing of the sort occurs until we come to the later clause, where we are distinctly told that when the property there described is sold, and the trustees have got the money, the property is to be resettled in the same way as "hereinbefore declared and contained concerning such part of the personal estate of or to which the said Florence Farquharson now is, or she or the said T. A. H. Williams in her right shall become possessed or entitled as aforesaid." That certainly seems to me a clear and

distinct declaration of the intention of the parties, that they had before declared and settled the manner in which the money that she now is possessed of shall be settled. It, to my mind, can have no other meaning put upon it than that which it would have if the words "now is" had been introduced in the earlier declaration. Although the words are put in an awkward place, they make it perfectly clear; and, that being so, I think that the jewellery and other articles in question, which were certainly the property of the wife, come under the covenant that they were to be excepted from the property conveyed to the trustees for the purposes of the marriage settlement, and are within the exception that they are to be for the separate use of Florence Farquharson. That being so, the creditor under the judgment had the right to seize them, and I think that this appeal should be dismissed, with costs.

LORD BRAMWELL.—I am entirely of the same opinion. The question is, whether this property is within the clause which says, "except jewels, trinkets, ornaments of the person," and so forth, "which it is hereby declared shall belong to the said Florence Farquharson for her separate use." Now that of course comprehends the chattels in question—in words I mean; but it is said that it cannot do so in reality for this reason, that it is an exception, and an exception can only apply to that which but for the exception would have been within the previous provision from which the exception is made; and it is said that the previous provision relates (to express it shortly) to after-acquired property. Cogent arguments have been used in support of that contention, and weighty authorities cited also. Assuming that the argument is well founded, that the clause from which the exception is made applies to future-acquired property only, I find that nevertheless there is this clause:—"Subject to the powers, provisoes, agreements, and declarations hereinbefore declared and contained concerning such part of the personal estate of or to which the said Florence Farquharson now is, or she or the said T. A. H. Williams in her right shall become possessed or entitled as aforesaid." That is a statement in the deed that there are powers, provisoes, agreements, and declarations with respect to the property of which the lady was then possessed. Now the only power, proviso, agreement, or declaration of any property of which she was then possessed is that which is contained in the exception; and therefore it seems to me that that subsequent clause to which I have referred clearly shews that the exception excepts something more than was contained in the preceding clause, if that preceding clause is to be limited as the appellant contends.

Well, but then that shews that the exception was badly drawn, that it was inaccurate and bad English—not ungrammatical, but that it was bad English in this sense, that it excepted something which was not previously included; and then the learned counsel for the appellant, especially Mr. Chester, have said, Conclude from that, that the later clause is wrong; reject the words "now is," and treat it as an idle statement which is capable of no application. Now I, on the contrary, feel perfectly satisfied that the later clause represents the real intention of the draftsman, and that it is by inadvertence that he has not worded his exception in such a way as to include this property in the earlier clause.

I am, therefore, of opinion that the judgment of the Court below is right and should be affirmed.

LORD FITZGERALD.—The doubt which I entertained on the construction of the settlement as to the declaration and agreement for the settlement of the wife's property has been so far removed by reference to the power given to the trustees over "the personal estate to which Florence Farquharson now is or she or her intended husband in her right shall become entitled," that I have now come to the conclusion that the construction adopted by the Court of Appeal is correct and entirely supports the decision of that Court.

Order appealed from affirmed; and appeal dismissed with costs.

Solicitors—Griffinhoofe & Brewster, for appellant; Lewis & Lewis, for respondent.

[IN THE HOUSE OF LORDS.]

1884. Nov. 4, 6, 7; Dec. 5. } SEWELL AND ANOTHER v. BURDICK.

Ship and Shipping—Bill of Lading—Indorsement by way of Security—Transfer of Property in Goods—Liability of Indorsee for Freight—Bills of Lading Act (18 & 19 *Vict. c.* 111), *s.* 1.

Where the owner of goods at sea indorsed the bill of lading in blank to secure an advance, intending that the indorsement should operate merely as a pledge, "the property in the goods did not pass" to the indorsee within the meaning of 18 & 19 *Vict. c.* 111. *s.* 1, *so as to render him liable in an action by the shipowner for the freight,*—So held, *reversing the judgment of the Court of Appeal.*

Semble (*per* LORD BLACKBURN), *an assignee of a bill of lading by way of mortgage is not, as such, liable to be sued for the freight.*

Per the LORD CHANCELLOR,—*The indorsee by way of security, though not having "the property" passed to him absolutely and for all purposes by the mere indorsement and delivery of the bill of lading while the goods are at sea, has a title by means of which he is enabled to take the position of full proprietor upon himself, with its corresponding burdens, if he thinks fit; and he actually does so as between himself and the shipowner if and when he claims and takes delivery of the goods by virtue of that title.*

Judgment in The Freedom (38 Law J. Rep. Adm. 25; Law Rep. 3 P.C. 594) *observed upon.*

This was an appeal from a judgment of the Court of Appeal reversing one of Field, J. The case is reported 52 Law J. Rep. Q.B. 428; 53 ibid. 399; Law Rep. 10 Q.B. D. 363; 13 ibid. 159.

The respondent, the owner of the steamship *Zoe*, sued the appellants for freight and charges in respect of goods shipped in the *Zoe* to Poti in Russia.

The bill of lading of the goods in question had during the voyage been indorsed in blank, and delivered to the appellants by the shipper as security for an advance.

On arrival at Poti the goods were sold by the Russian authorities for duty and custom-house charges, but did not produce more than enough for that purpose.

Field, J., held that the appellants were not liable as indorsees under the Bills of Lading Act; the Court of Appeal held that they were.

The Solicitor-General (*Sir F. Herschell, Q.C.*) (*Danckwerts* with him), for the appellants.—The following four propositions are contended for:—

1. The contract of pledge leaves the property in the goods in the pledgor, passing only a special property to the pledgee.

2. If the object of indorsing a bill of lading is to effect a contract of pledge, then the rights created by the indorsement are those of pledgor and pledgee.

3. The object here was to effect a pledge.

4. This was not a case in which, within the meaning of the Bills of Lading Act, the property passed to the indorsee.

It is not necessary to labour the first proposition.

In support of the second, it is urged that the indorsement and delivery of a bill of lading is equivalent to the delivery of the goods to which it relates, but does not pass the property unless there was an intention that it should. Brett, M.R., thought that *Lickbarrow* v. *Mason* (1) decided that the indorsement passed the property in all cases, and his judgment, and that of Baggallay, L.J., proceeded entirely on that ground. But all that was decided in *Lickbarrow* v. *Mason* (1) was that the consignor on indorsement lost the right to stop *in transitu*. The cases cited by Brett, M.R., do not support his view. There was no question of indorsement in *Evans* v. *Martlett* (2), and it was immaterial in *Hibbert* v. *Carter* (3) whether the interest of the consignee was legal or equitable. The direction of Buller, J., to the jury upon the new trial of *Hibbert* v. *Carter* (4), that the indorsement of a bill

(1) 1 Sm. L.C. (8th ed.) 753; 2 Term Rep. 63; 1 H. Bl. 357; 2 ibid. 211; 5 Term Rep. 367, 683; 6 East, 19*n*.

(2) 1 Ld. Raym. 271; 12 Mod. 156; 3 Salk. 290.

(3) 1 Term Rep. 745.

(4) Ibid. 748.

of lading *prima facie* transferred the whole property in the goods, but this was subject to be controlled by the evident intention of the parties, explains his opinion in *Lickbarrow* v. *Mason* (1) as not going to the extent supposed. Again, it is not true, as assumed by Field, J., and the Master of the Rolls, that the House of Lords in *Lickbarrow* v. *Mason* (1) adopted the view of Buller, J., and reversed the judgment of Lord Loughborough. The House gave no decision on the point, but awarded a *venire de novo* on purely technical grounds. The *dicta* of Lord Ellenborough and other Judges in *Newsom* v. *Thornton* (5), very soon after the decision in *Lickbarrow* v. *Mason* (1), shew that they did not understand the decision as the Court of Appeal has done. There are two direct decisions that the property does not pass on an assignment of a bill of lading by way of pledge—*Turner* v. *The Trustees of the Liverpool Docks* (6)—where the plaintiff could not have sued in detinue unless he had the legal property — and *Jenkyns* v. *Brown* (7). In *Meyerstein* v. *Barber* (8) the distinction between a mortgage and pledge was recognised, and the case was treated as one of pledge; see also *Franklin* v. *Neate* (9). The third proposition is that a contract of this nature is not a mortgage, but is a pledge. The cases of *Harris* v. *Birch* (10) and *Attenborough* v. *The Commissioners of Inland Revenue* (11) shew that it is not a mortgage within the Stamp Acts. In *Donald* v. *Suckling* (12) a similar contract was treated as a pledge, and the decision in that case was considered and approved in *Halliday* v. *Holgate* (13).

(5) 6 East, 17.
(6) 6 Exch. Rep. 543; 20 Law J. Rep. Exch. 393.
(7) 14 Q.B. Rep. 496; 19 Law J. Rep. Q.B. 286.
(8) 39 Law J. Rep. C.P. 187; Law Rep. 2 C.P. 38, 661; ibid. 4 H.L. 317.
(9) 13 Mee. & W. 481; 14 Law J. Rep. Exch. 59.
(10) 9 Mee. & W. 591; 11 Law J. Rep. Exch. 219.
(11) 11 Exch. Rep. 461; 25 Law J. Rep. Exch. 22.
(12) 35 Law J. Rep. Q.B. 232; Law Rep. 1 Q.B. 585.
(13) 37 Law J. Rep. Exch. 174; Law Rep. 3 Exch. 299.

[THE LORD CHANCELLOR referred to *In re Westzinthus* (14) and *Spalding* v. *Ruding* (15).]

Those cases are inconsistent with *Jenkyns* v. *Brown* (7). In *Kemp* v. *Falk* (16) the decision was only as to the right of stoppage *in transitu*, which right is defeated at law by a pledge of the bill of lading, because the stopper would not have the right to possession.

Fourthly, by this contract the property in the goods did not pass to the indorsee within the meaning of the Bills of Lading Act, s. 1. "The property" there means the whole legal property. It was decided in *Smurthwaite* v. *Wilkins* (17), and recognised as law in *Short* v. *Simpson* (18), that where "the property" has passed, the indorsee is the only person liable to the shipowner—an unreasonable result of the Act if it applies where the indorsement is a mere pledge perhaps for a small amount.

[LORD BLACKBURN referred to *The Freedom* (19).]

The point seems not to have been considered there—*Story on Bailments*, ch. 5, s. 297, *Blackburn on Sales*, pp. 279, 288, *Arnould on Marine Insurance* (2nd ed.), vol. 1, p. 301, and *Benjamin on Sales* (3rd ed.), p. 859.

Hall, Q.C., and *Edwyn Jones*, for the respondent. — The custom of merchants found in the verdict on the second trial in *Lickbarrow* v. *Mason* (1) has been incorporated in the law merchant, and has since been judicially recognised without proof. It is to the effect that the mere fact of indorsement for value of a bill of lading necessarily passes the whole property in the goods, whatever the intention of the parties. The case itself was one of pledge, not sale. The following authorities are in favour of the respondents' contention:

(14) 5 B. & Ad. 817; 2 Nev. & M. 644; 3 Law J. Rep. K.B. 56.
(15) 6 Beav. 376; 12 Law J. Rep. Chanc. 503.
(16) 52 Law J. Rep. Chanc. 167; Law Rep. 7 App. Cas. 573.
(17) 11 Comm. B. Rep. N.S. 842; 31 Law J. Rep. C.P. 214.
(18) 35 Law J. Rep. C.P. 147; Law Rep. 1 C.P. 248.
(19) 38 Law J. Rep. Adm. 25; Law Rep. 3 P.C. 594.

Cox v. *Harden* (20), *In re Westzinthus* (14), *Spalding* v. *Ruding* (15), *Short* v. *Simpson* (18), *Pease* v. *Gloahec* (21), *The Figlia Maggiore* (22), *The St. Cloud* (23), *Fox* v. *Nott* (24), *The Nepoter* (25), and *The Freedom* (19).

Harris v. *Birch* (10) only decides that the Stamp Acts are to be construed very strictly. Secondly, the inference from the evidence is that both parties intended the whole property to pass as in a mortgage. Unless the creditor takes the whole property, he cannot sell the goods to provide against a fall in the market price; the bill of lading cannot pass from hand to hand.

[THE LORD CHANCELLOR.—Is it possible that the meaning of "the property" can turn on the technical distinction in English law between legal and equitable property, considering that the Act is retrospective and affects the rights of foreigners, deals in fact with relations of private international law?]

It may be urged in conclusion that if the whole property did not pass, what did pass was sufficient to satisfy the Act.

The object of the Bills of Lading Act was to give the indorsee an interest in the contract. But if he takes the benefit, he takes the liability too.

[THE LORD CHANCELLOR.—It is reasonable that an indorsee who takes the whole benefit should be subject to the liabilities, but could it be intended that a mere secured creditor should be liable for the debt of the borrower?]

He would take care not to lend more than the excess in the value of the goods over the liability on the contract, and he would protect himself against loss by insuring. The pledgee has "the whole present interest"—*Halliday* v. *Holgate* (13).

Danckwerts.—With reference to the Lord Chancellor's question as to the effect of the Act on private international law, it may be observed that the law of the flag governs contracts made with ship-masters—*Lloyd* v. *Guibert* (26). But as the Act affects past transactions, it is improbable that it should turn on the technical distinction between legal and equitable rights. The natural meaning of "the property" would to an ordinary man be the whole interest, not a special or temporary interest—*Fox* v. *Nott* (24), *per* Martin, B.

Cox v. *Harden* (20) has no application.

Cur. adv. vult.

THE LORD CHANCELLOR (EARL OF SELBORNE) (on Dec. 5).—This appeal raises the question whether, under the Bills of Lading Act, 1855 (18 & 19 Vict. c. 111), every holder of a bill of lading indorsed in blank, who has taken it by way of security for an advance of money (and has not afterwards parted with it), is liable, by reason of such indorsement only, to an action for freight by the shipowner, although he may not have obtained delivery of the goods or derived any other benefit from his security.

The goods in this case were, by the terms of the bill of lading, deliverable at Poti, a Russian port on the Black Sea, and had been landed and warehoused there in a public warehouse (no one appearing to claim or take charge of them) before the date of the indorsement. This was their position when the present action was brought by the respondent, the shipowner, against the appellants, who are bankers at Manchester, and who had advanced 300*l.* to the shipper upon the security of the bill of lading. In his statement of claim the plaintiff alleged that the goods still remained at Poti under the care of the Russian authorities; that the plaintiff had, under Russian law, no power of selling them for the purpose of paying himself the amount claimed in the action (174*l.* 8*s.* 9*d.* and interest); and that the Russian authorities were about to sell the same for a sum barely sufficient to cover the customs duties and Government charges thereon. They were, in fact, sold by the Russian

(20) 4 East, 211.
(21) 35 Law J. Rep. P.C. 66; Law Rep. 1 P.C. 219.
(22) 37 Law J. Rep. Adm. 52; Law Rep. 2 Ad. & E. 106.
(23) Br. & Lush, 1.
(24) 6 Hurl. & N. 630; 30 Law J. Rep. Exch. 259.
(25) 38 Law J. Rep. Adm. 63; Law Rep. 2 Ad. & Ec. 375.
(26) 35 Law J. Rep. Q.B. 74; Law Rep. 1 Q.B. 115.

authorities, and did not realise more than the amount of those duties and charges.

Under these circumstances Mr. Justice Field (who tried the case without a jury) gave judgment for the defendants (the appellants here). That judgment was reversed by a majority—the Master of the Rolls (Sir W. B. Brett) and Lord Justice Baggallay—of the Judges in the Court of Appeal, Lord Justice Bowen dissenting.

The difference between those learned Judges, mainly (if not altogether) turned upon the question whether, according to the authorities from *Lickbarrow* v. *Mason* (1) downwards, the effect of an indorsement and deposit of a bill of lading, while the goods are *in transitu*, by way of security for a loan, is to pass the whole legal title to the goods, or only to pledge them, passing at law a "special property," and leaving the general property in the shipper.

That question was much debated in *Glyn, Mills & Co.* v. *The East and West India Docks Company* (27), where Lord Justice Brett expressed the same opinion on which he acted in the present case, Lord Justice Bramwell taking the opposite view. My noble friend Lord Blackburn, in his opinion on that case when it reached this House, adverted to the point, but thought it unnecessary to express any opinion upon it.

In the present case the true question is whether "the property" in the goods "passed to the indorsee upon or by reason of the indorsement," within the meaning of those words as used in the Bills of Lading Act of 1855. It was considered by the Master of the Rolls (Sir W. B. Brett) and Lord Justice Baggallay that if the effect of the indorsement and deposit was (as they thought) to pass the whole legal title to the goods to the appellants as indorsees, leaving an equitable interest only in the shipper, it was a necessary consequence that "the property passed" to them within the meaning of the statute, and that the respondent, the shipowner, was entitled to recover under the statute in this action. They clearly used the words "legal" and "equitable" in that technical sense which they have acquired in English law.

I am not myself satisfied that this consequence is necessary, but I admit that there are difficulties in the way of the contrary view; as there are also difficulties (arising from the strong and unqualified language used by Judges of great authority from the time when *Lickbarrow* v. *Mason* (1) was decided downwards) in the way of the opinion that an indorsement and deposit of a bill of lading in a case like the present operates by way of pledge, and not as an assignment of the whole legal title to the goods. The facts here are simply an indorsement in blank and deposit of the bills of lading so indorsed by way of security for money advanced. There are no special circumstances, except that the indorsee never did obtain, and that it was never possible for him (in fact) to obtain, delivery of the goods.

I should not feel greatly embarrassed (if there were no other authority) by the mere terms in which the custom of merchants was found in *Lickbarrow* v. *Mason* (1)—namely, that "bills of lading . . . . are after the shipment, and before the voyage performed, negotiable and transferable by the shipper's indorsement and delivery, . . . and that by such indorsement and delivery . . . . the property in such goods is transferred." This, it may be said, is the language of the Bills of Lading Act; but I do not understand it as necessarily meaning more than that "the property" which it might be the intent of the transaction to transfer, whether special or general, passes by such an indorsement according to the custom of merchants. The finding must be reasonably understood; it cannot (for instance) mean that the property will be transferred when there is no consideration.

But although the custom as found seems to me to be consistent with the view taken by Mr. Justice Field and Lord Justice Bowen in the present case, I have more difficulty in saying that the language of Mr. Justice Buller in the earlier stages of *Lickbarrow* v. *Mason* (1) is so. And in some later cases other great Judges have not only followed but have even gone beyond that language. The Court of Queen's Bench in *In re Westzinthus* (14)

(27) 49 Law J. Rep. Q.B. 303; 50 ibid. 62; 52 ibid. 146; Law Rep. 5 Q.B. D. 129; 6 ibid. 475; 7 App. Cas. 591.

held that a right of stoppage *in transitu* might be exercised against the interest remaining in the shipper subject to the security created by an indorsement and deposit of the bill of lading; but they did so on the ground, not that the shipper retained any legal title or interest, but that he had an equity of redemption, of which the form in which the question then arose enabled the Court to take notice. And although it is true that in *Harris* v. *Birch* (10) the Court of Exchequer, then composed of Barons Parke, Alderson, Gurney, and Rolfe, decided a question of stamp duty upon the ground that an indorsement and deposit of a bill of lading by way of security operated as a pledge; and Mr. Justice Coleridge in *Jenkyns* v. *Brown* (7) considered it to pass a special property only to the indorsee, leaving the general property in the shipper; and in *Meyerstein* v. *Barber* (8) all the Judges of the Common Pleas and in the Exchequer Chamber concurred in that view; yet on the other hand, when *Meyerstein* v. *Barber* (8) came to the House of Lords (where the judgments of those Courts were affirmed), Lord Hatherley and Lord Westbury used strong language of an opposite kind. Lord Hatherley said: "If anything could be supposed to be settled in mercantile law, I apprehend it would be this, that when goods are at sea the parting with the bill of lading . . . . is parting with the ownership of the goods;" and afterwards, "I apprehend that it would shake the course of proceeding between merchants, as sanctioned by decided cases, . . . if we were to hold that the assignment of the bill of lading, the goods being at the time at sea, does not pass the whole and complete ownership of the goods so that any person taking a subsequent bill of lading, be it the second or be it the third, must be content to submit to the loss which would arise from that state of facts." These words are hardly, if at all, qualified by the context, "so that," &c.; although in a later sentence (as to which see the remarks of Lord Blackburn in *Glyn, Mills & Co.* v. *The East and West India Docks Company* (27) the proposition is less absolute: "When the vessel is at sea, and the cargo has not yet arrived, the parting with the bill of lading is parting with that which is the symbol of property, and which for the purpose of conveying a right and interest in the property is the property itself" (28).

Lord Westbury's language is similar, perhaps stronger: "No doubt," he said, "the transfer of it" (the bill of lading) "for value passes the absolute property in the goods." He quoted some words of Chief Justice Erle, to which I shall afterwards refer, as having the same sense; he spoke of the first holder for value of the bill of lading as having "the legal ownership of the goods," "the legal right in the property," "both the right of property and the right of possession passing by a symbol —the bill of lading—which is at once both the symbol of the property and the evidence of the right of possession" (29).

To reconcile these expressions with those used in the same case by the Judges of the Common Pleas and in the Exchequer Chamber is scarcely possible; and yet no dissent from the views of those learned Judges was expressed in this House. On the contrary, their reasoning, and especially that of Mr. Justice Willes, was referred to with apparent approval, particularly by Lord Hatherley and Lord Chelmsford. In such a conflict, not of decisions, but of judicial phraseology if not doctrine, it becomes important to remember that it is often dangerous to infer, even from very strong words, when used *diverso intuitu*, conclusions on other subjects which if they had been present to the minds of the speakers might perhaps have led to their being more guarded or qualified. None of the cases to which I have referred arose upon the statute with which your Lordships have now to deal; they related, some to the right of stoppage *in transitu*, some to competing claims between holders for value of different parts of the same set of bills of lading. It may well be that as against all such claims, and against parties setting up interests adverse to the title of the indorsee for value, such words as "the legal ownership," "the legal right," "the right of property in the goods," might be used, and

(28) 39 Law J. Rep. C.P. at p. 190; Law Rep. 4 H.L. at p. 326.

(29) 39 Law J. Rep. C.P. at p. 195; Law Rep. 4 H.L. at p. 337.

the property which passed to the indorsee might be described as "absolute," in a sense substantially true, even though such property might, as between the indorsee receiving and the shipper depositing the bill of lading by way of security, be special only and not general, and though the most apt term for a scientific definition of the transaction as between the borrower and the lender may be, not assignment or transfer, but pledge.

In such a state of authority it is important to see how the matter stands in principle.

In principle, the custom of merchants, as found in *Lickbarrow* v. *Mason* (1), seems to be as much applicable and available to pass a special property at law by the indorsement (when that is the intent of the transaction) as to pass the general property when the transaction is, *e.g.*, one of sale. In principle, also, there seems to be nothing in the nature of a contract to give security by the delivery of a bill of lading indorsed in blank, which requires more, in order to give it full effect, than a pledge, accompanied by a power to obtain delivery of the goods when they arrive, and (if necessary) to realise them for the purpose of the security. Whether the indorsee, when he takes delivery to himself, may not be entitled to assume, and may not be held to assume, towards the shipowner the position of full proprietor is a different question. But so long at all events as the goods are *in transitu*, there seems to be no reason why the shipper's title should be displaced any farther than the nature and intent of the transaction requires. This is not inconsistent with what was said by Chief Justice Erle in *Meyerstein* v. *Barber* (8), that "the indorsement and delivery of the bill of lading while the ship is at sea operate exactly the same as the delivery of the goods themselves to the assignee after the ship's arrival would do." That learned Judge cannot have meant that possession of the symbol is for every purpose the same thing as actual possession of the goods; what he did mean was that the indorsement and delivery of the bill of lading by way of pledge (which he considered to be the effect of the transaction in that case) was equivalent, and not more than equivalent, to a delivery by way of pledge of the goods themselves. Lord Hardwicke, in *Snee* v. *Prescot* (30), thought that there was a difference between an indorsement of a bill of lading in blank and a personal indorsement, and (for some purposes) I think there is much reason for that opinion. If from a personal indorsement the inference might properly be drawn that a title by assignment, as distinguished from pledge, was meant to pass to the indorsee, it would not, in my opinion, follow that the same inference ought to be drawn from an indorsement in blank. Part of the custom of merchants found in *Lickbarrow* v. *Mason* (1) was that "indorsements of bills of lading in blank may be filled up by the person to whom they are so delivered or transmitted, with words ordering the delivery of goods to be made to such person; and, according to the practice of merchants, the same when filled up have the same operation and effect as if it had been done by the shipper." Whether it is or is not usual in practice to fill up the blank with any name before taking delivery, it is certainly not to be implied from the custom as thus found that the operation of the indorsement, while it remains in blank, is necessarily to all intents and purposes the same as if it were filled up with the holder's name. So long as it remains in blank it may pass from hand to hand by mere delivery, or it may be redelivered to the shipper without any new transfer or indorsement, which would not be the case if there were a personal indorsement. It would be strange if the Bills of Lading Act has made a person whose name has never been upon the bill of lading, and who (as between himself and the shipowner) has never acted upon it, liable to an action by the shipowner upon a contract to which he was not a party.

I am not, however, sure that for the decision of the present appeal it is really necessary to rely either upon any difference between a personal indorsement and one in blank, or upon the distinction between such a form of security as (in

(30) 1 Atk. 245, 249.

English law) might be held to pass the whole legal title and a simple pledge.

The statute with which your Lordships have now to deal is introduced by a preamble, the material part of which is that "by the custom of merchants, a bill of lading of goods being transferable by indorsement, the property in the goods may thereby pass to the indorsee, but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner; and it is expedient that such rights should pass with the property." The 1st section enacts that "every consignee of goods named in a bill of lading and every indorsee of a bill of lading to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself." The 2nd section provides that "nothing herein contained shall prejudice or affect any right of stoppage *in transitu*, or any right to claim freight against the original shipper or owner, or any liability of the consignee or indorsee by reason or in consequence of his being such consignee or indorsee, or of his receipt of the goods by reason or in consequence of such consignment or indorsement." There is nothing else material in that Act.

The statute contemplates the passing of "the property in the goods" by the indorsement of the bill of lading as a thing which may or may not happen, according to the nature and intent of the contract or dealing for the purpose of which that indorsement is made; and it seems to provide for those cases only in which the property so passes as to make it just and convenient that all rights of suit under the contract contained in the bill of lading should be "transferred to" the indorsee, and should not any longer "continue in the original shipper or owner." One test of the application of the statute may perhaps be, whether, according to the true intent and operation of the contract between the shipper and the indorsee, the shipper still retains any such proprietary right in the goods as to make it just and reasonable that he should also retain rights of suit (the word is "suit," not "action"), against the shipowner under the contract contained in the bill of lading. If he does, the statute can hardly be intended to take from him those rights and transfer them to the indorsee. If they are not transferred to the indorsee, neither is the indorsee subjected to the shipper's liabilities.

It is very difficult to conceive that when the goods are still *in transitu*, when the substance of the contract is not sale and purchase, but borrowing and lending, and when the indorsement and deposit of the bill of lading is only by way of security for a loan, it can be the intention of either party thereby, without more, to divest the shipper of all proprietary right to the goods, and to take from him and transfer to the indorsee all rights of suit under the contract with the shipowner. That some proprietary right (his original right, subject only to the creditor's security) remains in him is indisputable. If that proposition needed illustration from authority it would be found in the cases of *In re Westzinthus* (14), *Spalding* v. *Ruding* (15), and *Kemp* v. *Falk* (16). Can it be that he is by the statute deprived of all remedies, legal and equitable, under the bill of lading, as long as it remains in the hands of the secured creditor? The creditor, in the ordinary course of things, will do nothing until the time for payment or delivery of the goods arrives. Can it then be material whether the proprietary right thus remaining in the shipper while the goods are *in transitu* is legal or equitable? The statute relates to a subject of general mercantile law in which not Englishmen only but foreigners also may be and often are concerned. Foreign as well as British indorsements of bills of lading by way of security for advances (which may be made abroad, perhaps in countries not governed by English laws) are liable to be affected by it whenever recourse must be had to British Courts. It seems to me to be inconceivable that the construction of the words "the property in the goods" in such a statute can have been intended to depend upon any such technical distinction as that made

in English law (but by no means in the laws of all other countries in which the customs of merchants prevail) between legal and equitable titles.

It is to be observed further that the statute contemplates *beneficium cum onere* and not *onus sine beneficio*. It may be reasonable, if the indorsee has the benefit (as he would if he were a purchaser out and out, or if under his title as indorsee of the bill of lading he obtained delivery of the goods to himself), that he should take it with its corresponding burden, *quoad* the shipowner. But it would be the reverse of reasonable to impose upon him such a burden when he has neither entered into any contract of which it might be the natural result, nor (having taken a mere security) has obtained any benefit from it. This observation is fortified by the fact that the statute does not appear to distinguish between indorsements subsequent and those anterior to its enactment.

On the other hand, it seems impossible to suppose the Legislature to have passed this statute without some reference to the custom proved in *Lickbarrow* v. *Mason* (1), and to the law (whatever may be the true view of it) established on the same subject by later authorities in the English Courts. And if (as I think) it ought to be understood with some reference to that custom and to those authorities, I cannot persuade myself that its operation is altogether restricted to cases of out-and-out sale, or that an indorsee of a bill of lading by way of security, who converts his symbolical into real possession by obtaining delivery of the goods, ought never to derive any benefit from it. The authorities decided upon the statute itself appear to me to be most easily reconciled with its apparent objects, and with each other, by a view which, if hardly consistent with expressions to be found in some other cases, nevertheless seems to me to have a real and substantial foundation in reason and good sense—namely, that the indorsee by way of security, though not having "the property" passed to him absolutely and for all purposes by the mere indorsement and delivery of the bill of lading while the goods are at sea, has a title by means of which he is enabled to take the position of full proprietor upon himself, with its corresponding burdens, if he thinks fit; and that he actually does so as between himself and the shipowner if and when he claims and takes delivery of the goods by virtue of that title.

The authorities decided upon the statute are *Fox* v. *Nott* (24), *Smurthwaite* v. *Wilkins* (17), *The Figlia Maggiore* (22), and *The Freedom* (19). Another case, *Short* v. *Simpson* (18), was also cited during the argument at your Lordships' bar.

In *Fox* v. *Nott* (24) the only question determined was, that the shipowner retained his remedy by action against the shipper after the indorsement of the bill of lading (a case provided for by the 2nd section); but some of the learned Judges expressed opinions bearing upon the general construction of the statute. Chief Baron Pollock said, "The indorsee of the bill of lading may be sued under the statute, because *by taking the goods* he also takes the liability to pay the freight." Baron Martin said, "That statute means an actual vesting of the property as by bargain and sale;" and Baron Wilde said, "I agree with my brother Martin that the Act applies only to an absolute transfer of the goods, and was never intended to deprive a person who made advances on the security of the bill of lading of the benefit of the original contract of the shipper to pay the freight."

In *Smurthwaite* v. *Wilkins* (17) the indorsee of a bill of lading, who had indorsed it over to a third party, was held not to be liable to the shipowner. Chief Justice Earle said, "The contention on the part of the plaintiff is, that the property in the goods passing to the defendants by the assignment of the bill of lading, under the Bills of Lading Act, 18 & 19 Vict. c. 111, they are liable for the freight, although they never received the goods. . . . . The contention is, that the consignee or assignee shall always remain liable, like the consignor, although he has parted with all interest and property in the goods by assigning the bill of lading to a third party before the arrival of the goods. The consequences which this would lead to are so monstrous, so manifestly unjust, that I should pause before I consented to adopt this construction of the Act of Parlia-

ment. The person who received the goods was always considered liable for the freight; but that was not by virtue of an original liability as a contracting party, but on a contract implied from his acceptance of the goods. Looking at the whole statute, it seems to me that the obvious meaning is, that the assignee *who receives the cargo*" (the italics are in the report) "shall have all the rights and liabilities of a contracting party; but that, if he passes on the bill of lading by indorsement to another, he passes on all the rights and liabilities which the bill of lading carries with it." Sir E. Vaughan Williams agreed: "Looking" (he said) "at the preamble, and at the general scope and intention of the statute, I can entertain no doubt that the view presented by my Lord is the true one;" and he explained the effect of "the general scope" of the Act to be, "that where the right of property *leaves* the party, the rights and liabilities under the contract leave him also." A case, like the present, of a security on an indorsed bill of lading, not acted upon (and which, in fact, never could be acted upon) by taking delivery of the goods, but at the same time not transferred to any other person, differs (*in specie*) from that of a man who has transferred the bill of lading by indorsing it over to another. But I cannot see that it would be more reasonable to make the holder of such a security, which he has never realised, and never can realise, liable under the statute, than if he had parted with the bill of lading to somebody else.

The cases of *The Figlia Maggiore* (22) and *The Freedom* (19) were determined in the Court of Admiralty under another statute, which (as Dr. Lushington and his successors, in my opinion, rightly held) gave that Court jurisdiction when, and only when, there was, independently of that statute, a right of action or suit; and in those particular cases it appears to have been held that there was no such right of action or suit unless it was given by the Bills of Lading Act. In both of them the plaintiffs, indorsees by way of security of bills of lading, had claimed and obtained delivery of the goods, and then had brought actions against the shipowners for damages which they had sustained through breaches of the contracts contained in the bills of lading; and they were held entitled to recover. This was right, if an indorsee under such circumstances may rightly be held entitled to the benefit of the statute, as having elected to complete his potential and inchoate title by taking possession of the goods, and so placing himself towards the shipowner in the position of proprietor. May it not be said that "the property *in the goods*" then (if not before) "passes" to him "*by reason of* the indorsement"? The principle of the liability which under some circumstances was held, even before the statute, to attach to the indorsee taking delivery, was regarded by Chief Justice Erle in *Smurthwaite* v. *Wilkins* (17) as elucidating the policy and the objects of the statute itself; and both he and Chief Baron Pollock in *Fox* v. *Nott* (24) spoke of "taking the goods" and "receiving the cargo" as the test of its application. The authorities on that subject —*Jesson* v. *Solly* (31), *Stindt* v. *Roberts* (32), *Wegener* v. *Smith* (33), and *Chappell* v. *Comfort* (34)—seem from this point of view to deserve consideration.

The decision in the Court of Admiralty in the case of *The Freedom* (19) was affirmed by her Majesty in Council upon the advice of the Judicial Committee, and although it was on a point as to which the Admiralty had only a statutory jurisdiction concurrent with the Courts of common law, and though in all Admiralty cases the appeal now lies to this House, still this, as the decision of a Court of final appeal, ought not, in any later case, to be lightly departed from.

The case of *Short* v. *Simpson* (18) did not really require anything to be decided as to the effect of the statute, and nothing was, in fact, so decided. It was there held that, *quocunque modo*, whether under the statute or independently of the statute, the shipper, to whom a bill of lading which he had indorsed and delivered to his creditor by way of security was re-indorsed and re-delivered upon payment

(31) 4 Taunt. 52.

(32) 17 Law J. Rep. Q.B. 166.

(33) 15 Com. B. Rep. 285; 24 Law J. Rep. C.P. 25.

(34) 10 Com. B. Rep. (N.S.) 802; 31 Law J. Rep. C.P. 58.

of the loan, was remitted to his original rights.

Upon the whole, I cannot dissemble that this case appears to me to be attended with some considerable difficulties. But those difficulties are mainly technical, arising out of a comparison of the language of the statute with various and not always consistent forms of expression found in authorities not decided with a view to any such consequences as those which the statute would produce. They deal with questions between unpaid vendors of goods comprised in bills of lading and *bona fide* indorsees of the same bills of lading for value, or between competing and adverse claimants to priority as *bona fide* holders for value of the bills of lading themselves. The statute, on the other hand, deals with questions between shippers and indorsees of bills of lading claiming under them, and between indorsees and shipowners. The preponderance of principle and reason appears to me to be against the proposition, that, as between those parties, it can have been intended by or can be the effect of the statute to make the creditor of the shipper liable (in effect) as his surety to the shipowner (with whom he was never brought in contact), by reason only of the deposit with him by way of security of a bill of lading indorsed in blank; his right under that deposit being (whether at law or in equity) special and not general, and the shipper retaining (whether at law or in equity) the real and substantial property in the goods, subject to the security. It had not, until the present case, been directly or indirectly determined by any authority that such is the effect of the statute.

My conclusion is, that the appellants ought to be exonerated by your Lordships' judgment from the respondent's action; and that the order of the Court of Appeal ought to be reversed, with costs.

LORD BLACKBURN.—The judgment of Mr. Justice Field was reversed by the order now under appeal. The case was tried before him without a jury, and I think it is necessary to see what he had to determine. There was no question between vendor and vendee, nor of stoppage *in transitu*, raised, for there was neither a vendor nor a stoppage. The law and decisions as to stoppage *in transitu* might be relevant in construing the statute 18 & 19 Vict. c. 111, but did not otherwise affect the rights of the parties.

It will be seen by reference to the statement of claim and of defence that it was not suggested that the defendants were, at the time the goods were shipped, in any way interested in the goods, nor that they were, either as undisclosed principals or otherwise, parties to the contract in the bill of lading until it was delivered to them after the ship had sailed and the goods were in the hands of the shipowners to be carried under the bill of lading, and were not yet delivered, with an indorsement in blank by Nercessiantz, the consignee named in the bill of lading.

I do not think that, either at the trial or on the argument, it was at all disputed that at common law the remedy of the shipowner under a bill of lading was by enforcing his lien upon the goods, or by bringing an action on the contract against any one who, at the time when the goods were shipped, was a party to the bill of lading, either as being on the face of it a contracting party, or as being an undisclosed principal of such a party. In either of these cases he might be sued as having been from the beginning a party to the contract.

Some attempts had been made to say that the contract in a bill of lading might, under some circumstances at least, be transferred to an assignee in a manner analogous to that in which the contract in a bill of exchange was transferred by the indorsement of the bill of exchange; but I think, since the decision in *Thompson* v. *Dominy* (35) in 1845, it has been undisputed law that under no circumstances could any one not a party to the contract from the beginning sue on it in his own name. Any action on the contract at common law must be brought in the name of an original contractor, and no action could be brought on the contract against one who was not liable to be sued as an original contractor.

But ten years later the 18 & 19 Vict c. 111 was passed. The preamble states

(35) 14 Mee. & W. 403; 15 Law J. Rep. Exch. 320.

this as one of the objects which the Legislature had in view, "Whereas by the custom of merchants, a bill of lading of goods being transferable by indorsement, the property in the goods may thereby pass to the indorsee" (which I think for a long time before the 18 & 19 Vict. 1855, was undisputed), "but, nevertheless, all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner" (this, it is to my mind clear, refers to *Thompson* v. *Dominy* (35)), "and it is expedient that such rights should pass with the property."

The mode in which the Legislature carry out the object thus expressed in the preamble is by section 1: "Every consignee of goods named in a bill of lading, and every indorsee of a bill of lading, to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself."

The case made on the statement of claim was that "the" property had passed upon, or by reason of, the indorsement to the defendants; not that they were before that a party to the contract in the bill of lading, but that, by virtue of the Act 18 & 19 Vict., when the property passed they became subject to the same liabilities as if the contract contained in the bill of lading had been made with themselves.

It is not disputed that the delivery of the bill of lading to the defendants with the indorsement of the consignee on it in blank was an indorsement, nor that whatever interest then passed to them still remained in them. What was in issue was whether upon or by reason of that indorsement "the" property passed.

The first and most important question to be decided in this case is, what is the true construction of the 18 & 19 Vict. c. 111. Does "the property" in the goods there mean any legal property in the goods so as to be satisfied by proof that a legal property passed accompanied by a right of possession so as to entitle the transferee to maintain trover, though it was intended by the parties, and was as between them, to be by way of security only, the transferor retaining a right of redemption either by way of a common law retention of the general property, though the pledgee had a right to the possession and a property as pledgee, a right exceeding a lien, or the whole property at law having passed by way of mortgage, the transferor retaining an equity of redemption, which in 1855 was an equitable right, enforceable only in a Court of equity?

I think that all the Judges below were of opinion that if the right reserved was the general right to the property at law, what was transferred being only a pledge (conveying, no doubt, a right of property and an immediate right to the possession, so that the transferee would be entitled to bring an action at law against any one who wrongfully interfered with his right), though "a" property, and "a" property against the indorser, passed "upon and by reason of the indorsement," yet "the" property did not pass. And I agree with them. I do not at all proceed on the ground that this being an indorsement in blank, followed by a delivery of the bill of lading so indorsed, had any different effect from what would have been the effect if it had been an indorsement to the appellants by name.

The case of *The Freedom* (19) was cited, and I think there are expressions used in the judgment delivered in that case by Sir Joseph Napier which indicate that the Judicial Committee were not of that opinion. It is said: "The plaintiffs were consignees for sale, but, as part of the transaction, a bill of exchange was drawn by the consignors for nearly the full value of the goods; the bills of lading were indorsed by them and forwarded to the plaintiffs, by whom the draft of the consignors was accepted and paid in due course." If that was the transaction (and, whether it was so or not, the Judicial Committee proceeded on the assumption that such was the transaction), the plaintiffs in *The Freedom* (19) were in exactly the position of Church in the case of *Newsom* v. *Thornton* (5), the case to which I shall have to refer afterwards. Church had the bill of lading indorsed to him as a factor or consignee for sale, and had therefore a right to hold the goods as against the indorser as a security for all

his advances, and he had authority at common law to sell the goods, and, before the arrival of the ship, to transfer the bill of lading in furtherance of a sale; but he had no authority to pledge either the goods or the bill of lading. It is true that, by the Factors Acts, the plaintiffs in *The Freedom* (19) would have had a power, which Church had not, to pledge the bill of lading, but as they did not exercise that power it could make no difference.

The judgment then proceeds: "The legal title to the property in the goods specified in the bills of lading was thus transferred to and vested in the plaintiffs; the right of suing for the contract in the bills of lading was transferred to them by force of the statute 18 & 19 Vict. c. 111." The judgment then proceeds to shew, I think correctly, that the *dictum* of Baron Martin, reported in *Fox* v. *Nott* (24), was not necessary for the decision in *Fox* v. *Nott* (24), and goes on: "Their Lordships are satisfied that it was intended by this Act that the right of suing upon the contract under the bill of lading should follow the property in the goods therein specified—that is to say, *the legal title to the goods as against the indorser*." It certainly seems to me that their Lordships thought that "the" property passed within the meaning of the 18 & 19 Vict. c. 111, if any legal right to hold as against the indorser passed.

The statute which their Lordships had to construe was the 24 & 25 Vict. c. 10, s. 6, which is in these terms: "The High Court of Admiralty shall have jurisdiction over any claim by the owner" (that is, of the goods) "or consignee or assignee of any bill of lading of any goods carried into any port in England or Wales in any ship, for damage done to the goods or any part thereof by the negligence or misconduct of or for the breach of any duty or breach of contract on the part of the owner, master, or crew of the ship, unless it is shewn to the satisfaction of the Court that at the time of the institution of the cause any owner or part-owner of the ship is domiciled in England or Wales."

It is not necessary to put a construction on the 24 & 25 Vict. c. 10. s. 6. I think that there are very good reasons for contending that a person who has possession of an indorsed bill of lading without any right at all to hold it against the indorser, without being owner of any interest in the goods, is not an "assignee" within the meaning of this enactment, and consequently that what I understand to be the actual decision of Dr. Lushington in *The St. Cloud* (23), that such a person could not sue under the Admiralty Act, may have been right enough. It is not necessary to decide that. But I agree with what was said in *The Nepoter* (25), that it is contrary to all rules of construction to interpolate any reference to the Bills of Lading Act into the Admiralty Court Act. I think, therefore, that the actual point decided in *The Freedom* (19) might be quite right, for the plaintiff in that action had "a" property, and a very substantial property, in the goods as against the indorsers, and every one else perhaps, and was in every sense an assignee of the bill of lading. The opinion expressed on the construction of the 18 & 19 Vict. c. 111, that in that Act the property meant a legal title as against the indorser, was perhaps unnecessary, and I think not sound.

The words used in the statute are not such as *prima facie* to express such an intention. No one, in ordinary language, would say that when goods are pawned or money is raised by mortgage on an estate, the property either in the goods or land passes to the pledgee or mortgagee; and I cannot think that the object of the enactment was to enact that no security for a loan should be taken on the transfer of bills of lading unless the lender incurred all the liabilities of his borrower on the contract. That would greatly, and I think unnecessarily, hamper the business of advancing money on such securities which the Legislature has, by the Factors Acts, shewn it thinks ought rather to be encouraged.

It is not uncommon to reduce into writing the agreement between the banker and his customers as to the terms on which the bills of lading deposited by them as securities are to be held. Such was the case in *Glyn* v. *The East and West India Docks Company* (27), as to which I shall have more to say hereafter.

When there is such a writing, it is, in the absence of fraud, conclusive as between

the parties as to what they intended. And I do not in the least question that such a writing may be so expressed as to shew that between the parties the transfer was a mortgage, though of goods, in the manner with which every one is familiar with regard to lands. The equity of redemption in such a case was an equitable estate only, and in 1855 enforceable in equity, not at law.

Where there is neither a symbolical delivery by a transfer of a bill of lading, nor an actual delivery of the goods themselves, there may be (though there seldom is) a substantial difference in the rights of the lender, according as the transaction is of the one kind or the other.

In *Howes* v. *Ball* (36) Ball sold and delivered a coach to John Howes (since deceased) under an agreement in writing, in which there was this clause—"And further I, John Howes, do agree that Thomas Ball do have and hold a claim upon the coach until the debt be duly paid." John Howes died without having paid the debt. Ball, after his death, seized the coach, for which seizure the action was brought by the executor. Had that agreement amounted to a mortgage by John Howes to Ball, I take it there could have been no doubt that the mortgagee would have had as much right against the executor of John Howes as he would have had against John Howes himself. But it was held that it did not amount to a mortgage, but only to an agreement that Ball should have a right of hypothec; and, there having been no delivery by Howes to Ball, the decision was that, though so long as John Howes lived and held the property in the coach, Ball might have justified a seizure as against him, he could not justify a seizure as against the representatives.

In *Flory* v. *Denny* (37), where the agreement was "as an additional security" for a loan "to assign all" the debtor's "right and interest" in a chattel, it was held to be a mortgage, and to operate so as to transfer the property, without any delivery, as a bargain and sale out and out of the goods would, though an agreement to create a pledge would, according to *Howes* v. *Ball* (36), have conveyed no property of any kind in the goods without a delivery.

But where the goods are at sea, and there is a transfer of the bill of lading, there is a delivery of possession, symbolical, it is true, but all that can be given. The question whether there was a mortgage, or only a common-law pledge or hypothec, it being accompanied by delivery, might affect the question what was the Court in which those rights were to be enforced, but does not affect the substance of the rights. The borrower, if ready and willing to pay the money, might in the one case be able to bring an action at law against the lender who refused to allow him to redeem, and in the other have to sue in equity; but, as it would equally be a pledge, his rights would be the same in substance. I am therefore strongly inclined to hold that even if this was a mortgage there would not have been a transfer of "the" property within the meaning of the 18 & 19 Vict. c. 111. This is contrary to the opinions not only of the Master of the Rolls (Sir W. B. Brett) and Lord Justice Baggallay, but of Mr. Justice Field also.

Lord Justice Bowen, who agreed with Mr. Justice Field in thinking that this was not a mortgage but only a pledge, did not express any opinion as to what would have been the law if it had been a mortgage. I believe all the noble and learned Lords who heard the argument are agreed with him in thinking that in this case it was only a pledge. I do not, therefore, intend to express a final decision that an assignee of a bill of lading by way of mortgage is not as such liable to be sued under the 18 & 19 Vict. c. 111; but only to guard against its being supposed that, even if the Master of the Rolls (Sir W. B. Brett) and Lord Justice Baggallay were right in holding this a mortgage, I, as at present advised, should agree in their conclusion that the defendant could be sued.

I now proceed to consider the question on which the Court of Appeal were divided in opinion, but the majority made the order now appealed against. The question is stated by the Master of the Rolls (Sir W. B. Brett) to be—"Does the indorsement of a bill of lading as a security

(36) 7 B. & C. 481; 6 Law J. Rep. Q.B. 106.
(37) 7 Exch. Rep. 581; 21 Law J. Rep. Exch. 223.

for an advance by a necessary implication which cannot be disproved pass the legal property in the goods named in the bill of lading to the indorsee, with an equity in the indorser, the borrower, to redeem the bill of lading by payment, or to receive the balance, if any, on a sale?"

Mr. Justice Field had held, and Lord Justice Bowen agreed with him, that it might so operate if so intended by the parties at the time, but did not so operate if it was intended to be no more than a pledge as distinguished from a mortgage.

I do not understand that any one of the Judges below disputed that, if it was a question of intention depending on the evidence, the finding of Mr. Justice Field was right; but the majority in the Court of Appeal proceeded on the principles laid down by Lord Justice Brett in *Glyn* v. *The East and West India Docks Company* (27). In that case the terms on which the bill of lading was delivered to Glyn & Co. were reduced to writing, and the question therefore whether it was intended to deliver it by way of pledge only, or by way of a mortgage, depended on the construction of that writing. Whether Lord Justice Brett thought that on the construction of the written instrument it was intended to be a mortgage, I do not know; I do not think he proceeded on that ground. He said it was a mortgage, and that the effect of the statute 18 & 19 Vict. c. 111 was to transfer the rights to sue and the liability to be sued to Glyn & Co.

Lord Bramwell (then Lord Justice Bramwell) was of an opposite opinion on both points. He thought that Glyn & Co. had a special property and a right of possession, and no more.

In the House of Lords I said, "I do not think it necessary to express any opinion on a question much discussed by Lord Justice Brett, I mean whether the property which the bankers were to have was the whole legal property in the goods, Cottam & Co.'s interest being equitable only; or whether the bankers were only to have a special property as pawnees, Cottam & Co. having the legal general property. Either way the bankers had a legal property, and at law the right to the possession, subject to the shipowners' lien, and were entitled to maintain an action against any one who, without justification or legal excuse, deprived them of that right." All the noble and learned Lords agreed in this. I think therefore the decision of this House is a strong authority in support of the position which I have before advanced, that the rights of a mortgagee having taken a bill of lading, and the rights of a pawnee having taken a bill of lading, are in substance the same.

I did not think it necessary to point out that the question which the House in *Glyn* v. *The East and West India Docks Company* (27) had to decide, and did decide, would have been just the same if the 18 & 19 Vict. c. 111 had never been passed or had been repealed, and consequently that it was unnecessary to express any opinion on the construction of that Act, but it obviously was so.

Before proceeding further, I wish to point out what, in my opinion, is a great misapprehension as to the effect of the decision of this House in *Lickbarrow* v. *Mason* (1), and as to the weight to be given to the opinion of Mr. Justice Buller delivered in this House and reported in the note to 6 *East*.

I have already said that in this case there is no sale, no vendor, and no vendee, and no stoppage *in transitu*, so that this misapprehension, as I think it is, is not so material as it might be in some other cases.

A demurrer to evidence, as is pointed out by Chief Justice Eyre in delivering the unanimous opinion of the Judges in *Gibson* v. *Hunter* (38)—not *Gibson* v. *Minet*, as is by mistake said in the note in 6 *East*—though not familiar in practice, was a proceeding well known to the law. He explains it, and states his very confident expectations (which have been justified by the result) that no demurrer to evidence would again be brought before the House.

It may be well to point out the dates. The demurrer to evidence in *Lickbarrow* v. *Mason* (1) was in 1787. The only case of a demurrer to evidence in what were then recent times was *Cocksedge* v. *Fanshawe* (39), on which judgment had been given in this House in 1783. Neither in

(38) 2 H. Black. 187, 205.
(39) 1 Dougl. 119.

the King's Bench nor in the Exchequer Chamber was any question raised in *Lickbarrow* v. *Mason* (1) as to the mode in which the questions discussed were raised. In 1790 the writ of error from the decision of the Exchequer Chamber was brought before the House of Lords. The law peers at that time were Lord Thurlow, Lord Loughborough, and Lord Kenyon. When it was argued does not appear, but it was argued, and the same question as had been asked of the Judges in *Cocksedge* v. *Fanshawe* (39) was asked of the Judges. Six Judges (including all the survivors of those who had joined in Lord Loughborough's judgment in the Exchequer Chamber) answered in favour of the respondent. The three Judges who had given judgment in the King's Bench answered in favour of the appellant. This House delayed giving its opinion till 1793. In the meantime, in 1791, there was a demurrer to evidence in *Gibson* v. *Hunter* (38) which was brought before this House. The case in this House is reported 2 *H. Black.* 187. On the 7th of February, 1793, this House gave judgment, awarding a *venire de novo*. One week afterwards, on the 14th of February, 1793, this House delivered judgment in the long pending case of *Lickbarrow* v. *Mason* (1), awarding in that case also a *venire de novo*. Lord Loughborough was himself at that time Lord Chancellor.

I should have thought, if anything was clear, it was that this House did not decide anything, except that on that demurrer to the evidence no judgment could be given. Certainly the last conclusion that I should draw is that stated by Mr. Justice Field, that the House in which Lord Loughborough was Chancellor decided, "presumably" on the opinion delivered by Mr. Justice Buller, against the judgment of Lord Loughborough, which six Judges to three had thought right. Neither can I at all agree in the opinion expressed by Mr. Justice Field, that the opinion of Mr. Justice Buller has always been taken as the law, and been adopted and followed as the law up to the present day. It never was published till 1805, in a note to 6 *East*, 19. I have for many years been of opinion, and still remain of opinion, that much of what Mr. Justice Buller expresses in that opinion as to stoppage *in transitu* was peculiar to himself, and was never adopted by any other Judge, and is not law at the present day. But it is not necessary to pursue this subject further, as I agree with Lord Justice Bowen that neither the statement of the custom of merchants in the special verdict in *Lickbarrow* v. *Mason* (1), nor the opinion of Mr. Justice Buller, justifies the inference that the indorsement of a bill of lading for a valuable consideration must pass the entire legal property whatever was the intention of the parties.

In *Lickbarrow* v. *Mason* (1) Turing was an unpaid vendor to Freeman. He had indorsed the bill of lading to Freeman, and had not, therefore, any right except that of stopping the goods whilst *in transitu* if Freeman became insolvent without having paid for the goods, and that right he had, though the indorsed bill of lading had been sent on to the vendee, so long as that bill of lading remained in the vendee's hands. But before any such stoppage, Freeman, for valuable consideration, indorsed the bill of lading to Lickbarrow, who, whether as mortgagee or pledgee, had a legal property accompanied by a right of possession. The point which I understand to have been decided in *Lickbarrow* v. *Mason* (1) was that, on the transfer of the bill of lading to Lickbarrow, the goods ceased to be *in transitu*, the shipowner from that time no longer holding them as a middleman to carry the goods from the unpaid vendor, Turing, to Freeman, his vendee, but holding them as agent for Lickbarrow. It was held, first in *In re Westzinthus* (14), and then in *Spalding* v. *Ruding* (15), that, where the *transitus* was thus put an end to by what was in reality only a pledge, the stoppage might be made available in equity so far as the rights of the pledgee did not extend. I thought, and still think, that the reason why the stoppage could not be made available at law was because the shipowner no longer held the goods as a middleman, inasmuch as the transferee of the bill of lading, for valuable consideration and *bona fide*, so as to give him a security, whether by way of mortgage or by way of pledge, had a legal property in the goods which he could enforce as against the shipowner. Such

being my view of the law, whether it was right or wrong, I expressed myself accordingly in *Kemp* v. *Falk* (16) so as to shew that I thought so; but there was nothing in that case to call for a decision on the point now before this House.

In *Newsom* v. *Thornton* (5) Lord Ellenborough says, "I should be very sorry if anything fell from the Court which weakened the authority of *Lickbarrow* v. *Mason* (1) as to the right of a vendee to pass the property of goods *in transitu* by indorsement of a bill of lading to a *bona fide* holder for a valuable consideration and without notice. For as to *Wright* v. *Campbell* (40), though that was the case of an indorsement of a factor, it was an outright assignment of the property for value. Scott, the indorsee, was to sell the goods and indemnify himself out of the produce the amount of the debt for which he had made himself answerable. The factor at least purported to make a sale of the goods transferred by the bill of lading, and not a pledge. Now this was a direct pledge of the bill of lading, and not intended by the parties as a sale. A bill of lading, indeed, shall pass the property upon a *bona fide* indorsement and delivery where it is intended so to operate, in the same manner as a direct delivery of the goods themselves would do if so intended, but it cannot operate further."

Mr. Justice Lawrence, at page 43, says, speaking of *Lickbarrow* v. *Mason* (1): "All that that case seems to have decided is, that where the property in the goods passed to a vendee, subject only to be divested by the vendors' right to stop them while *in transitu*, such right must be exercised, if at all, before the vendee has parted with the property to another for a valuable consideration and *bona fide*, and by indorsement of the bill of lading given him a right to recover them." And Mr. Justice Le Blanc says that what they then determine "will not break in at all upon the doctrine of *Lickbarrow* v. *Mason* (1), that the indorsement of a bill of lading upon the sale of the goods will pass the property to a *bona fide* indorsee, the property being intended to pass by such indorsement."

In *Glyn, Mills & Co.* v. *The East and West India Docks Company* (27) Lord Justice Brett says (speaking of an opinion of Mr. Justice Willes): "To say that an indorsement of a bill of lading for an advance is only a pledge seems to me to be inconsistent with what *has always been considered* to be the result of *Lickbarrow* v. *Mason* (1)—namely, that such an indorsement passes the legal property"—by which I understand him to mean the whole legal property. But neither in that case nor in the case now at bar does he refer to any authority to that effect. Expressions used by Judges have been cited which, I think, only shew that they did not carefully consider their language, where no question of the kind before us was under discussion. And, as far as I know, there is no decision subsequent to *Lickbarrow* v. *Mason* (1) which proceeds on such a ground, whilst *Newsom* v. *Thornton* (5) proceeds expressly on the ground that the indorsement of a bill of lading, when intended to be a pledge only, is not valid if made by one who has no authority to make a pledge. I do not know that I am justified in saying that it is a decision that, if it was made by one who had authority to make a pledge, it would be good as such, though I think that appears to have been Lord Ellenborough's opinion; and I do not think any authority was cited on the argument at the bar to shew that such is not the law. No case was cited at the bar, nor am I aware of any in which it has been held that a transfer of the bill of lading for value necessarily, whatever might be the intention, passed the whole legal property. The Master of the Rolls says: "If the general understanding of merchants had not been in accordance with the verdict of the jury in *Lickbarrow* v. *Mason* (1), accepted in its largest sense, there would, one would think, have been many cases in the books raising the question." With submission to the Master of the Rolls, I think no weight can be given to this absence of authority until it is shewn that there have been cases in which it became material to consider whether an indorsement intended to be and operating as a pledge at law had a less effect than an indorsement operating against the intention as a mortgage. I have already given my reasons for thinking that in

(40) 4 Burr. 2016.

substance the rights would be the same. Without, therefore, deciding the question whether a mortgage would render the mortgagee liable under the 18 & 19 Vict. c. 111, I decide that, mainly for the reasons given by Lord Justice Bowen, this transfer did not operate as a mortgage.

I therefore am clearly of opinion that the order made by the Court of Appeal should be reversed with costs, and the judgment of Mr. Justice Field restored.

Lord Bramwell.—I concur. This action would not have been maintainable at common law. Is it maintainable under 18 & 19 Vict. c. 111? That depends upon whether the appellants are indorsees of the bill of lading "to whom the property in the goods therein mentioned has passed upon or by reason of such indorsement." It is found as a fact, and rightly found, as is admitted, that all that was intended in the transaction was a pledge. This would give the appellants "a" property, but, as put by Lord Justice Bowen, not "the" property. As I understand the Master of the Rolls, if this could be, then the appellants are right; but he thinks it could not be—that *Lickbarrow* v. *Mason* (1), or rather Mr. Justice Buller's judgment, shews that when a bill of lading is indorsed to give any title to the transferee the entire property is passed, and that in such a case as this nothing but an equitable right to redeem remains in the transferor. It is for those who assert this to prove it. I cannot prove the negative that it is not so, and logically and reasonably I might content myself with saying that it is not proved to me—that I see no reason and no authority in support of it. But I go further—I think that authority and reason are against it.

I will not discuss or examine the cases. They do not, in my opinion, justify the contention. I will not examine them in detail; that has been done by the Lord Chancellor. I understand his conclusion to be that the expressions of learned Judges which have been relied upon should be read and interpreted *secundum subjectam materiam*. I agree; in no case has the present matter been under consideration. As to the reason and principle which should govern, I ask why should the transfer of the bill of lading have a greater effect, contrary to the parties' intention, than the handing over of the chattels themselves would have? They could be pledged if on shore, but being at sea no actual delivery, which is necessary to a common-law pledge, can take place. There can, however, be a symbolical delivery by transferring the bill of lading. Why should the effect be different?

Then consider the inconvenience of holding that the pledgor has only an equitable right: that he may repay the loan at the day appointed, but thereby acquire no legal title to the possession of the goods: that the pledgee may sell and pass the entire property to one not having notice of the equitable title. Consider what difficulties would be put on those who lend on such securities if this action was maintainable. The banker who lent money on a bill of lading for goods which arrived in specie, but damaged by perils of the seas so as to be worthless, might lose the money lent and the freight. Another consequence would be that the transferee of the bill of lading, though only interested to the amount of the loan on it, would be the person to bring actions on the contract to carry. It is true that unless he can do so in all cases he can in none, even where his interest is to the extent of the full value of the goods. Either this was not thought of by the Legislature, or, if it was, they thought that no case could be included unless all were, and that it was better to include none than all.

It is to be observed that the statute in its preamble says that by indorsement the property "may" pass. It is to be remembered also, as pointed out by my Lord Chancellor, that this law bears upon foreigners out of the kingdom. I am the more surprised at this contention on the part of the Master of the Rolls as he has always so ably and powerfully contended that mercantile laws, contracts, and usages should be as free as possible from technicality.

I am of opinion that the appeal should be allowed. I cannot truly say that I have any doubt on the matter.

I take this opportunity of saying that I think there is some inaccuracy of expression in the statute. It recites that

"by the custom of merchants, a bill of lading being transferable by indorsement, the property in the goods may thereby pass to the indorsee." Now the truth is that the property does not pass by the indorsement, but by the contract in pursuance of which the indorsement is made. If a cargo afloat is sold, the property would pass to the vendee, even though the bill of lading was not indorsed. I do not say that the vendor might not retain a lien, nor that the non-indorsement and non-handing over of the bill of lading would not have certain other consequences. My concern is to shew that the property passes by the contract. So if the contract was one of pledge the property would be bound by the contract, at least as to all who had notice of it, though the bill of lading was not handed over.

There is, I think, another inaccuracy in the statute, which indeed is universal. It speaks of the contract contained in the bill of lading. To my mind there is no contract in it. It is a receipt for the goods, stating the terms on which they were delivered to and received by the ship, and therefore excellent evidence of those terms, but it is not a contract. That has been made before the bill of lading was given. Take for instance goods shipped under a charter-party, and a bill of lading differing from the charter-party—as between shipowner and shipper at least the charter-party is binding—*Gledstanes* v. *Allen* (41).

These distinctions are of a verbal character, and not perhaps of much consequence; but I am strongly of opinion that precision of expression is very desirable, and had it existed in such cases as the present there would not have been the contradictory opinions which have been given.

LORD FITZGERALD.—Mr. Justice Field in the Court below came to the conclusion that the transaction under investigation was intended by the parties to operate as a pledge only. There can be no doubt that the inference thus drawn by the learned Judge was correct in fact. It seems to follow that the pledgees acquired a special property in the goods, with a right to take actual possession should it be necessary to do so for their protection or for the realisation of their security. They acquired no more, and, subject thereto, the general property remained in the pledgor.

I am of opinion that the delivery of the indorsed bill of lading to the defendants as a security for their advance did not by necessary implication transfer the property in the goods to the defendants. They were not therefore "indorsees of a bill of lading to whom the property in the goods passed by reason of the indorsement," so as to make them, without more, "subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with them."

The judgments which have been just delivered are so very full, and so able and satisfactory, that it would be mere affectation on my part to attempt to do more than express my concurrence.

Order appealed from reversed. Order of FIELD, J., *restored. Respondent to pay the costs in the Court below and in this House.*

Solicitors—Hare & Co., agents for H. J. Leach, Manchester, for appellants; Lowless & Co., for respondent.

[IN THE COURT OF APPEAL.]

1884. Nov. 12, 19. THE QUEEN (*on the prosecution of* HOOLEY) *v.* THE JUSTICES OF STAFFORDSHIRE.

Practice—Writ of Mandamus—Return of Obedience—Right to plead to—9 Anne, c. 25, Revised Statutes, c. 20, Ruff.—46 & 47 Vict. c. 49—Rules of Court, 1883, *Order LIII. rule 9; Order LXVIII. rule 1; Order LXXII. rule 2.*

[For the report of the above case, see 54 Law J. Rep. M.C. 17.]

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(41) 12 Com. B. Rep. 202.

1884. Dec. 10. } HAWES AND SON *v.* THE SOUTH EASTERN RAILWAY COMPANY.

Carrier—Contract to carry by Special Train and Boat—"Wind, weather, and tide permitting"—Notice of Special Purposes—Measure of Damage—Loss of Market—Deterioration.

Two consignments of fish for transport by special train and tidal boat from London viâ Folkestone to Boulogne were made to a railway company who advertised special trains and boats at special rates subject to the conditions contained in their tables. One of these conditions was that the company would not be answerable for loss occasioned by the trains or boats not starting or arriving at the time specified; and another that the boats started "wind, weather, and tide permitting." In each case, on arrival at Folkestone, it was found that it was not prudent to load the fish on the tidal boat, owing to the state of the weather, and the fish had to be sent in the cargo boat, in consequence of which the Paris train at Boulogne was missed and the fish delayed for twenty-four hours, and deteriorated, besides losing the market:— Held, *that there was no absolute guaranty that the fish would go by that particular train and boat, but that it was for the jury to say whether under the circumstances the defendants had been guilty of negligence or whether they had substantially fulfilled their contract.* Held also, *that, in estimating the damages, the loss of the market in Paris by the non-arrival of the fish at Boulogne in time to catch the train for Paris was not to be taken into account.*

On the 22nd of October, 1883, the plaintiffs delivered to the defendant company thirty-eight barrels of fish, labelled to go by special fish train and tidal boat to Boulogne, and consigned to the care of an agent there of a Paris firm, for the purpose of their being forwarded by train to Paris. By the company's time-table this train was timed to leave London at 1.12 A.M. and to arrive at Folkestone at 3.10 A.M. whence the tidal boat would leave at 3.54 A.M.

The amount of fish was unusually large owing to a special catch of fish made a day or two before, and it only happened once or twice in the course of the year that such a quantity was sent at one time. On the arrival of the fish at Folkestone, the captain of the tidal boat refused to take it on board, as it was a deck cargo, and the state of the weather rendered it dangerous to load such a cargo. The fish was therefore sent on by a cargo boat at 5.14 A.M., and did not reach Boulogne till 7.45 A.M. As the Paris train left Boulogne at 8.20 A.M. it was impossible to transfer the fish from the boat to the train, and it was in consequence not forwarded till twenty-four hours later, and on its arrival in Paris was deteriorated by the delay, and the price of fish having in the meantime gone down the plaintiff sued for damages for the amount so lost by the deterioration and loss of market.

On the 25th of October, 1883, there was again a large consignment—forty-three barrels—to go by the 7.15 A.M. train from London, reaching Folkestone at 8.55 A.M. The Boulogne boat was timed to leave Folkestone at 9.10 A.M., leaving only a quarter of an hour to get the fish on board. But it was not attempted to load it, as the captain thought it dangerous to take such a cargo after the bad weather of the previous day. Twenty-eight horses, however, that had been waiting three days for a passage, were taken, and with these there would not have been room to stow the fish. In consequence of this refusal the fish had to be sent on by a cargo-boat, and arrived too late for the Paris train. In this case also there was a delay of twenty-four hours, with deterioration of the fish and loss of market.

In each case the fish was delivered subject to the conditions contained in the company's printed time-tables, one of which was that the company would not be responsible for the arrival or departure of the trains and boats at the times specified except in the case of the wilful neglect or default of themselves or their servants, and another that they would not be responsible for any loss or damage sustained by reason of the non-arrival of the trains in time to catch a particular boat or train. The boats were also advertised to take special cargoes of fish, "wind, weather, and tide permitting."

At the trial before Mr. Justice Williams a verdict and judgment passed for the

plaintiffs for 75*l.* The defendants now moved for a new trial on the ground of misdirection by the learned Judge.

The Hon. B. Coleridge, for the defendants. —The learned Judge ruled that the clause as to "wind, weather, and tide permitting" only applied when the boats were beaten back or it was not safe to start. This amounts to an undertaking that if the goods are received and the train and boat go, they shall go with them. But there is no such undertaking—*Lord* v. *The Midland Railway Company* (1).

The learned Judge was also wrong in telling the jury that the fact that the physical capacity of the ship to carry the goods was reduced by the necessity to keep her seaworthy did not bring the case within the exception. But it is submitted that it did—*Le Blanche* v. *The London and North Western Railway Company* (2). The circumstances were exceptional, and the company are only bound to use ordinary care—*Anderson* v. *The North British Railway Company* (3).

The conditions subject to which the goods were shipped protect the company from warranty of due arrival—*Horne* v. *The Midland Railway Company* (4). The company had no direct notice that the goods were intended for the Paris market —*Candy* v. *The Midland Railway Company* (5), *The Parana* (6), and *The Notting Hill* (7). Where there is deterioration the value is to be ascertained at the place of arrival, which in this case is Boulogne —*Collard* v. *The South Eastern Railway Company* (8); and the difference between that on the actual arrival, and the value if it had duly arrived, is the measure of damage—*Horne* v. *The Midland Railway Company* (4).

(1) 36 Law J. Rep. C.P. 170; Law Rep. 2 C.P. 339.

(2) 45 Law J. Rep. C.P. 521; Law Rep. 1 C.P. D. 286.

(3) Court of Sess. Cas. 4th series, vol. 2. p. 443.

(4) 42 Law J. Rep. C.P. 59; Law Rep. 8 C.P. 131.

(5) 38 L. T. 226.

(6) 45 Law J. Rep. P., D. & A. 108; Law Rep. 2 P. D. 118.

(7) 53 Law J. Rep. P., D. & A. 56; Law Rep. 2 P. D. 105.

(8) 7 Hurl. & N. 79; 30 Law J. Rep. Exch. 393.

Finlay, Q.C. (with him *D. Kingsford*).—It was admitted by the defendants' own witnesses that the company would take any quantity of fish tendered at Charing Cross, and it would be negligence to take in October such a quantity as they could safely carry only in summer weather. They could have taken the second consignment in its entirety had they not preferred to take the twenty-eight horses. It was proved that a second boat could have been got ready in time to prevent the loss of the Paris train if they had telegraphed to Folkestone when they found the quantity was so large. They ought to form a reasonable judgment as to the weather and the capacity of the boat. Whereas here they took such an amount of fish as could be carried in no weather, considering the other cargo they accepted. It was in effect left to the jury by the Judge to say whether the defendants had done all that was reasonable. The defendants are liable for the difference between the value of the goods at the time at which they arrived and that which would have been their value if they had been delivered at the time contracted for—*Collard* v. *The South Eastern Railway Company* (8) and *Wilson* v. *The Lancashire and Yorkshire Railway Company* (9). The company had notice that the goods were intended for Paris, and this was therefore not an ordinary contract to carry in a reasonable time, but a special undertaking to carry through by special conveyance at special rates with a special knowledge of the intended ultimate destination—*Simpson* v. *The London and North Western Railway Company* (10).

CAVE, J.—There must be a new trial in this case. The action is for delay in the delivery of part of a consignment of fish sent on the 22nd and 25th of October, 1883, to Boulogne by the plaintiffs by the defendants' tidal service. By the terms of the contract the goods were to be sent by the special train and tidal boat—wind, weather, and tide permitting. On the 22nd of October, 1883, on the arrival of the consignment at Folkestone, the whole

(9) 9 Com. B. Rep. N.S. 632; 30 Law J. Rep. C.P. 232.

(10) 45 Law J. Rep. Q.B. 182; Law Rep. 1 Q.B. D. 274.

could not be shipped on board the tidal boat in the then state of the weather with safety to the boat, and consequently a part of it had to be shipped on board a cargo boat, which did not arrive at Boulogne until an hour after the train for Paris had left. By reason of this delay the fish did not reach Paris till twenty-four hours later than it would have arrived if sent on by tidal boat, and was then in a deteriorated condition. The learned Judge directed the jury that the fact of not carrying by the tidal boat was a breach of contract, because the defendants had undertaken to carry more cargo than at the time of leaving port her physical capacity limited by the necessity of her seaworthiness would admit of her taking on board. With this I cannot agree. I think that a carrier such as this company when agreeing to carry is bound to take reasonable care that the goods consigned to them shall either go by the particular boat or by some boat which will take the goods so that they shall arrive at their destination within a reasonable time. The company, in my judgment, knew that that destination was Paris, and were bound to use all reasonable care to get them there in time; but of course if they were prevented by unforeseen or inevitable circumstances, such as stress of weather, not attributable to their default, they would not be liable. But this question of negligence was not put to the jury, and that was a misdirection. As to the consignment on the 25th of October, 1883, the case is different. The company received the fish and took it to Folkestone, and though the state of the weather was such as to make it dangerous to carry the goods by the tidal boat, yet the company had not left time between the arrival of the train and the starting of the boat to allow of the fish being got on board. Even then, however, if they had sent on the fish in some other way so as to catch the Paris train there would have been a substantial compliance with the terms of the contract; but this was not done. Another reason for not putting the fish on board the tidal boat was their own act in taking twenty-eight horses on board at Folkestone, thus leaving insufficient room for the fish. I think, therefore, the company unjustifiably broke the contract. But when the question of damages is considered we meet with another difficulty. They appear to have been made up of two sums, first, the deterioration of the fish by the delay, and secondly, the fall in the prices of fish in the Paris market between the 26th and the 27th. In my judgment the latter cannot be recovered. The contract here is to deliver at Boulogne, and the measure of damages is—although it is admitted that sending them on to Paris was the prudent thing to do—what would any one at Boulogne have given for the fish if it had arrived in proper course, and what would he have given for it when it did arrive. An element of damage that is not recoverable having been thus admitted, there must be a new trial.

LORD COLERIDGE, C.J., concurred.

Order absolute for new trial.

Solicitors—C. J. Hobbs, agent for Davenport, Jones & Glenister, Hastings, for plaintiffs; W. R. Stevens, for company.

1884. Dec. 5. GLEN (*appellant*) *v.* THE CHURCHWARDENS AND OVERSEERS OF THE PARISH OF FULHAM (*respondents*).

Metropolis Management Act—Rating—Precept to Overseers, where issued—18 & 19 *Vict. c.* 120. *ss.* 158 *and* 161.

[For the report of the above case, see 54 Law J. Rep. M.C. 9.]

1884. Dec. 1. RIDGWAY (*appellant*) *v.* WARD (*respondent*).

Bread, Sale by Weight—Delivery from Cart without Weights and Scales—Prior Order—6 & 7 *Will.* 4. *c.* 37. *s.* 7.

[For the report of the above case, see 54 Law J. Rep. M.C. 20.]

[IN THE COURT OF APPEAL.]

1884. Nov. 22, 27, 28. Dec. 18. SOCIÉTÉ GÉNÉRALE DE PARIS AND ANOTHER *v.* THE TRAMWAYS UNION COMPANY (LIMITED) AND OTHERS.*

Company—Shares—Choses in Action—Notice to Company—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 22 *and* 30—*Priority—Recognition of Trusts by Company and its Officers.*

The later in time of two persons holding from the registered shareholder agreements to transfer shares in a company registered under the Companies Act, 1862 *and* 1867, *neither of whom has a transfer giving him a title to be registered by the company, does not obtain a title superior to that of the holder of the first agreement by first giving notice of his agreement to the company.*

Section 30 *of the Companies Act*, 1862, *which provides that no notice of any trust shall be entered on the register or be receivable by the registrar, means that no notice of a trust is to be taken by the company, although* (*per* COTTON, L.J., *and* LINDLEY, L.J., *dubitante* BRETT, M.R.), *if the directors have knowledge of circumstances rendering it wrong to accept a transfer, they may be personally liable.*

Information given at the funeral of a shareholder to a relative who was secretary of the company, held not to amount to notice to the company.

The execution by a registered shareholder of a deed of transfer, blank as to the name of the transferee and the number and numbers of shares, which blanks were subsequently filled in without re-execution and without the transferor seeing the deed in its complete state, does not confer a legal title to the shares.

Martin *v.* Sedgwick (9 Beav. 333) *commented on.*

Appeal of the defendants Janet Walker, William Stuart Walker, and Frederick Ramsay Walker, executors of James Scott Walker, deceased, hereinafter called "the defendants," from the judgment of Lopes, J., without a jury, delivered at Liverpool on the 9th of April, 1884, whereby the plaintiffs the Société Générale de Paris and Germain Colladon, hereinafter called "the plaintiffs," were adjudged entitled to one hundred fully paid-up shares of the Tramways Union Company (Limited), and "the defendants" ordered to deliver the certificates and transfers thereof to the plaintiffs and to pay 30*l.* damages and costs to the plaintiffs.

The plaintiffs the Société Générale de Paris are a French banking company, of which the plaintiff Germain Colladon was the manager of the London branch. The defendants the Tramways Union Company (Limited) are a company with liability limited by shares incorporated under the Companies Acts, 1862 and 1867. By an order dated the 18th of January, 1883, all proceedings in the action against the Tramways Union Company (Limited) were stayed. The defendant James Montgomery Walker did not appear to the writ. The remaining defendants, being the appellants, are the executors of James Scott Walker, deceased.

On and previously to the 9th of March, 1881, and subsequently, the one hundred shares in question were duly registered in the books of the defendant company in the name of the defendant James Montgomery Walker.

On the 9th of March, 1881, the defendant James Montgomery Walker, by an agreement of that date, gave a charge on the shares to James Scott Walker, the deceased, and handed to him the certificates and a transfer in blank.

On the 18th of February, 1882, James Scott Walker died. His funeral was attended by his relative J. E. Walker, who was the secretary of the defendants the Tramways Union Company (Limited). After the funeral the agreement of the 9th of March, 1881, was read to J. E. Walker.

On the 1st of December, 1882, the defendant James Montgomery Walker purported to give a charge on the same shares to the plaintiff company, to secure a debt from him to them, and executed a deed of transfer which was blank as to the number and the numbers of the shares and as to the name of the transferee. Subsequently the name of the plaintiff Colladon, the manager of the company, as transferee, and the number and the numbers of the shares were inserted, and the transfer was exe-

* *Coram* Brett, M.R., Cotton, L.J., and Lindley, L.J.

cuted by the plaintiff Colladon. The defendant James Montgomery Walker accounted for the absence of the certificates by saying that they had been mislaid. The transfer was so executed on the 28th and 30th of December, and tendered to the Tramways Union Company for registration, an indemnity against the lost certificates being offered. The plaintiffs had no notice of the charge to James Scott Walker until after they had so tendered the transfer to the Tramways Union Company.

By section 22 of the Companies Act, 1862, it is enacted that "the shares or other interest of any member in a company under this Act shall be personal estate capable of being transferred in manner provided by the regulations of the company."

Article 26 of the articles of association of the Tramways Union Company (Limited) is as follows:—"Subject to the exercise by the company of the powers conferred by the Companies Act, 1867, of issuing share warrants to bearer, and to any regulations of the company in that behalf, shares shall be transferred only by deed executed by the transferor and transferee and duly entered in the register of transfers."

By section 30 of the Companies Act, 1862, it is enacted that "no notice of any trust, expressed, implied, or constructive, shall be entered on the register or be receivable by the Registrar in the case of companies under this Act and registered in England and Wales."

Article 22 of the articles of association of the Tramways Union Company (Limited) was as follows:—"The company shall not be bound by or recognise any equitable, contingent, future, or partial interest in any share or any other right in respect of a share except an absolute right thereto in the person from time to time registered as the holder thereof, and except also, as regards any parent, guardian, committee, husband, executor or administrator or trustee in bankruptcy, his right under these presents to become a member in respect of or to transfer a share."

Rigby, Q.C. (*B. B. Rogers* with him), for the defendants the executors of James Scott Walker.—The titles of both claimants are equitable, and the defendants were both first in time and notice of their title was first given to the company. The notice to the secretary at the funeral was a good notice, although received in his character as relative. In *Gale* v. *Lewis* (1) it was held that notice obtained as the attorney of a transferee of a policy was good notice to the company of which the attorney was agent. In *Alletson* v. *Chichester* (2) a notice given to the secretary of an insurance company in the course of conversation on other matters was held a good notice. *Spencer* v. *Clarke* (3) is almost directly in point. He also cited *The Shropshire Union Railway and Canal Company* v. *The Queen* (4).

If this contention be untenable, we say that the shares are not *choses in action* in the sense that notice binds their disposition, although they have some of the qualities of *choses in action*—*e.g.* they are *choses in action* within the meaning of the order and disposition clause in bankruptcy—*Ex parte The Union Bank of Manchester* (5).

[COTTON, L.J., referred to the remarks of Turner, L.J., in *Ex parte Boulton* (6), as to notice upon the equitable assignment of shares.]

Those cases turned on the consent of the true owner.

[COTTON, L.J., referred to *Martin* v. *Sedgwick* (7).]

In that case the company would have been bound by notice of the trust. *Ex parte Littledale* (8) is a similar case to *Ex parte Boulton* (6).

Finlay, Q.C., and *J. M. Solomon*, for the plaintiffs.—Lopes, J., decided that the plaintiffs had a superior equity to the defendants. The rule as to notice is conveniently laid down in *Rice* v. *Rice* (9).

(1) 9 Q.B. Rep. 730; 16 Law J. Rep. Q.B. 119.
(2) 44 Law J. Rep. C.P. 153; Law Rep. 10 C.P. 319.
(3) 47 Law J. Rep. Chanc. 692; Law Rep. 9 Ch. D. 137.
(4) 45 Law J. Rep. Q.B. 31; Law Rep. 7 E. & I. App. 497.
(5) 40 Law J. Rep. Bankr. 57; Law Rep. 12 Eq. 354.
(6) 1 De Gex & J. 163; 26 Law J. Rep. Bankr. 45.
(7) 9 Beav. 333.
(8) 6 De Gex, M. & G. 714; 24 Law J. Rep. Bankr. 9.
(9) 2 Drew. 77, 78; 23 Law J. Rep. Chanc. 289.

Priority in time only governs when the equities are equal. There were no *laches* on the part of the plaintiffs, as the absence of the certificates was accounted for. See the observations of Lord Cottenham in *Mangles* v. *Dixon* (10). The plaintiffs gave notice on tending the transfer; the defendants' notice at the funeral was not a good notice, as the secretary had not authority to receive it. Under section 19 of the Companies Act, 1856 (19 & 20 Vict. c. 47), which provides that no notice of a trust shall be "receivable by the company," Lord Westbury held, in *Ex parte Stewart* (11), that notice to the directors was binding. *A fortiori*, it is binding under section 30 of the Companies Act, 1862, which says that no notice shall be received by the Registrar. The articles of association of this company are more strongly worded, but the same reasoning applies. Notice is effectual to take the shares out of the order and disposition clause of the Bankruptcy Act—*Ex parte Boulton* (6) and *Ex parte The Agra Bank* (12). If the notice in this case was ineffectual to bind the company, it was equally ineffectual in the order and disposition cases. In *Cumming* v. *Prescott* (13) the priorities were held to depend on the priority of notice.

The transfer executed was in accordance with article 26. See *Perkins on the Lawes of England* (section 118). *Hudson* v. *Revett* (14) is not distinguishable from this case. In *Hall* v. *Chandless* (15) an alteration of a lease after execution by some of the parties was held not to invalidate it. Registration of the transfer would be effectual after notice of the defendants' charge—*Dodds* v. *Hills* (16), *Texira* v. *Evans* (17), and *France* v. *Clarke* (18).

Ex parte Vallance (19) and *Binney* v. *The Ince Hall Coal Company* (20) were also referred to. As to the certificates not being forthcoming they cited *The Shropshire Union Railway Canal Company* v. *The Queen* (4); and as to damages, *Jacques* v. *Miller* (21).

Rigby, in reply.

Cur. adv. vult.

BRETT, M.R.—I am almost inclined not to express a judgment in this case. Still, as I have formed an opinion upon the matter, I shall express it shortly, and my brothers, who are far more conversant with the subject-matter of this appeal, will give more elaborate judgments.

The person named James Montgomery Walker seems to me in this case to have acted as a fraudulent person, and the question is, who is to suffer by reason of his fraud. He had raised money or borrowed money from James Scott Walker, whom the executor defendants represent, and he had mortgaged or charged certain shares. He had delivered to James Scott Walker the certificates of those shares, and he had given him a blank transfer; but neither James Scott Walker nor his executors had completed their title to the shares by getting themselves entered upon the register. It is obvious, therefore, that their title was a mere equitable title. James Montgomery Walker afterwards borrowed money from the plaintiffs, and assumed to hypothecate or to pledge the same shares with them. He gave the numbers of the shares and a blank transfer, alleging that the certificates of the shares were lost. If nothing else had happened I apprehend that what he did would have amounted to an equitable mortgage of these shares to the plaintiffs, and did not confer a legal title on them. It was alleged that there had been a legal transfer to the plaintiffs by reason of his having executed a transfer deed; and it was said, having done that which was equivalent to a legal transfer, he gave them a legal title I shall not go further into that transaction than to say I have come to a clear opinion that it was not brought within the case of *Hudson* v. *Revett* (14) which has been cited, and what happened could not be treated as a delivery of a deed by him, and

(10) 1 Mac. & G. 446; 19 Law J. Rep. Chanc. 240.
(11) 4 De Gex, J. & S. 543; 34 Law J. Rep. Bankr. 6.
(12) 37 Law J. Rep. Bankr. 23; Law Rep. 3 Chanc. App. 555.
(13) 2 You. & C. 488.
(14) 5 Bing. 368; 7 Law J. Rep. C.P. (o.s.) 145.
(15) 4 Bing. 123.
(16) 2 Hem. & M. 424.
(17) *Ex rel.* Wilson, J., in *Master* v. *Miller*; 1 Anst. 228.
(18) 53 Law J. Rep. Chanc. 585; Law Rep. 26 Ch. D. 257.
(19) 3 Mont. & Ayr. 224; 6 Law J. Rep. Bankr. 52.
(20) 35 Law J. Rep. Chanc. 363.
(21) 47 Law J. Rep. Chanc. 544; Law Rep. 6 Ch. D. 153.

that therefore the right of the plaintiffs, just like the right of the defendants, was an equitable right only.

Now we come to the question, what are the rights of the parties, the rights of both being mere equitable rights. These shares are shares in a company, which company is within the provisions of the Act of 1862, and this company had in its articles a clause which went as far as, and probably farther than, the enactments with regard to such a company in the Act of 1862. We have to deal, therefore, with the equitable rights of these parties to be exercised with regard to shares in such a company. The question resolves itself into a question of notice. It was said that the defendants had given notice to the company of their equitable right, and in support of that allegation there were circumstances which were given in evidence with a view to shewing that knowledge was brought to the secretary of the company at a funeral. Now I confess that my mind never could go for an instant with the supposition that such a communication was to be considered as notice to the company; it is a casual knowledge brought home to the secretary, not as secretary, but in quite another capacity—namely, as a relative or friend of the deceased person whose funeral he was attending—and nobody, except in the stress of argument at the bar, would argue that such notice to the secretary of a company would amount to notice to the company. Therefore you have the equitable rights of the executor defendants existing first in point of time, but without any notice of their equitable claim given to the company.

Now comes the question whether the plaintiffs, although their equity is brought into existence later than the defendants', can, within any equitable doctrine, obtain priority over the defendants? It was alleged that they could, because it was said that they had given notice to the company. It is true, in point of fact, that they have given a notice to the secretary, which would have been notice to the company. But what is this equitable doctrine of notice giving a superior title, and what does it involve? The equitable doctrine seems to me to involve this, that you cannot say the plaintiffs have given a valid notice to the company, conferrin superior title, unless at the same time you say that that notice has involved certain consequences and liabilities upon the company—that is, has turned them into trustees. Therefore, unless the notice has had that effect, it seems to me that the equitable doctrine cannot be said to be fulfilled.

Now this raises the question, what is the effect upon that equitable doctrine of the section which has been cited in the Act of 1862, and of such an article as that which appears in the articles of association of the company in question. The Act says that such a company need not take any notice of equitable trusts—it need not be bound by them; but if you allow this notice to the company to put them in the position of trustees, it seems to me you do exactly the thing which the Act of Parliament forbids. If they are to be turned into trustees, of necessity you bind them to take notice of trusts. It was suggested at one time that the only meaning of that Act of Parliament was that they need not enter the trusts upon the register, so that the register would be kept simple and clear. After considering the matter I cannot accept that view. For the moment it impressed me much. It was said to have been the suggestion of Lord Westbury, yet I do not think his suggestion went that length, and I certainly do not think that such can be the meaning of the Act of Parliament. The legislation would be practically ineffectual if you confined the meaning of it only to that extent. It seems to me that the Act of Parliament meant that the company need not take notice in any way at all of trusts. It is contrary to sense to say that you can give a notice to a company which will involve them in responsibility, and at the same time say that they need not, and are not bound to take any notice of trusts at all. The one statement contradicts the other. It seems to me that a person in the position of the plaintiffs, having the equitable rights of the plaintiffs, cannot, so far as the company is concerned, give a valid notice to the company which shall have the effect of bringing in the equitable doctrine, so that the notice of the plaintiffs gives them a priority over the defendants. Whether the personal notice to the secretary, or whether personal

notice to some of the directors, or supposing all of them had personal notice—whether that would put any responsibility in equity upon them individually it seems to me not necessary to decide in this case. In the case of the secretary, for instance, the suggestion would seem to me to put him into a difficulty in which, as at present advised, I have an inclination of opinion that no man ought to be put, namely, that on the one hand he would incur responsibility by doing anything contrary to the notice given him by persons in the position of the plaintiffs, and on the other, he might be directed and ordered by his own masters to do that which would be a breach of that responsibility. I doubt very much whether any personal obligation can be put upon the secretary by such a notice. It is not intended to be a notice to him upon which he is to act as an individual, but it is only given to him in order that he may transfer it to the directors or the company of whom he is the servant. The same difficulty to my mind exists with regard to individual directors, whether they can be made personally responsible—because directors again, although they are in a different position to the secretary, are after all mere servants of the company, and I have my doubts even about them. I only say this as to the individual responsibility of persons to whom notice is actually given by way of guarding myself from being obliged to decide that point now or to decide it before it is absolutely necessary for the Court to come to a conclusion upon the matter. Therefore I myself, for the reasons I have shortly given, am of opinion that the plaintiffs in this case have no equity superior to that of the defendants, and that the defendants' prior equity ought therefore to prevail.

With regard to the authorities which have been cited in reference to goods being within the order and disposition of the bankrupt, my own opinion is that they do not touch this case. In the great majority of cases raising the question whether goods are within the order and disposition of the bankrupt, there are two parts to the proposition: they must be in the order and disposition of the bankrupt, and also there must be the consent of the true owner. My own opinion is that all the cases but one with regard to this matter in which such shares have been considered, turned upon the question whether they were in the order and disposition of the bankrupt with the consent of the true owner; and that the fact of notice having been given by the equitable owner shewed that they were not in the order and disposition of the bankrupt with his consent. With regard to the case of *The Agra Bank* (12), my own view of it is this: that the Court assumed, without fully considering the point which is now before us, that by reason of notice the shares in that case were not in the order and disposition of the bankrupt—and therefore, as advised, that case does not in any way govern this. Whether the considerations which have been called to our attention in this case were or were not overlooked in that case is not material, when that case is being considered not by way of appeal from it, but merely as an authority for a legal proposition.

COTTON, L.J.—The plaintiffs in this case seek to establish as against the defendants, the executors of James Scott Walker, a claim to 100 shares in the Tramways Union Company, now standing in the name of James Montgomery Walker. The title of the executors is admittedly equitable only, and the first question is, what is the plaintiffs' title? Is it, as alleged by the statement of claim, legal, or equitable only?

The articles of the Tramways Union Company require that transfers of shares in the company must be by deed. It appears that at the time when J. M. Walker signed and sealed the instrument on which the plaintiffs rely, neither the number or numbers of the shares nor the name of the intended transferee was inserted, but that the name of the plaintiff Colladon, the number and the numbers of the shares were afterwards filled in, but not by or by the direction or in the presence of the defendant J. M. Walker. He, after the blanks were thus filled in, sent to the Tramways Union Company a letter to indemnify them if they would recognise the transfer of the shares without production of the certificate, which, in fact, was then in the possession of James Scott

Walker. But it does not appear that J. M. Walker knew whose name had been inserted as transferee, and in my opinion there is no such evidence as would justify us in finding that there was a delivery by J. Montgomery Walker of the transfer as his deed after the blanks had been filled in.

Under these circumstances I am of opinion that no deed of transfer of the shares in favour of the plaintiff Colladon was executed by J. M. Walker so as to enable the plaintiffs to require the company to register Colladon as holder of the shares, and that the action must be considered as one by the plaintiffs to compel J. M. Walker specifically to perform his contract with them by transfer of the shares, notwithstanding the claims of the defendants the executors of J. S. Walker. These claims are founded on a contract earlier in date than that under which the plaintiffs claim, and the question is, how can the plaintiffs establish that the Court is required to disregard the priority which the dates give to the executors, unless there is sufficient to give the plaintiffs an equity against the executors so as to prevent them from insisting as against the plaintiffs on their title to the shares.

The principal point urged on behalf of the plaintiffs was this: that notice of their claim to the shares was given to the company before the board had any knowledge or notice of the claim of the executors, and that on the principle laid down in *Dearle* v. *Hall* (22) this gave priority to the plaintiffs.

I will first dispose of the contention urged on behalf of the defendants, that, in fact, notice was given of their claim before any was given of the plaintiffs' charge. What the executors relied on as notice was this: the secretary of the company, whose duty it was to keep under the control of the board the register of transfers, was a relation of J. S. Walker, and he was present when, on the day of the funeral, the solicitor of the deceased read, amongst other documents relating to the deceased's estate, the agreement under which the executors claim. When notice to the board is necessary it is not essential that notice should be given formally, but notice to be effectual must be information given or coming to them as directors, or in a matter relating to the interests of their company. But here the information given to the secretary was given to him not as secretary to the company, but as a relation of the deceased, and not with reference to the affairs or business of the company, but as explanatory of the state of the affairs of the deceased. I am of opinion that the defendants the executors have not shewn that the board or the company had notice of their claim before they received notice of that of the plaintiffs'.

We must, therefore, consider the question, which is one of great importance, whether the priority of notice given by the plaintiffs is sufficient to displace the prior claim of the executors.

The company was one formed under the Companies Act, 1862. The 22nd section of that Act enacts as follows: "The shares or other interest of any member in a company under this Act shall be personal estate capable of being transferred in manner provided by the regulations of the company."

The 30th section enacts: "No notice of any trust, expressed, implied, or constructive, shall be entered on the register or be receivable by the Registrar in the case of companies under this Act and registered in England or Ireland."

Moreover, the 22nd of the articles of association of the company provides as follows: [the learned Judge read it.] Of course this is subject to the qualification, that if a transfer be executed so as to be effectual under the Act and the regulations, the transferee has a right, as against the company, to be recognised as a legal shareholder and to be entered upon the register.

The defendants say, that having regard to the Act and articles, any notice to the board would be inoperative and of no effect, that the Act and articles justify and require the board to disregard any notice given of any contract affecting shares other than an effectual deed of transfer. This contention, I think, goes too far. The clause in the Act and that in the articles prevent any one from asserting, as between himself and the company, that he is entitled to the position, or any of the benefits of the position, of a share-

(22) 3 Russ. 1.

holder, unless he is an allottee of shares, or a transferee under an instrument such as required by the constitution of the company. But neither the Act of Parment nor the articles in any way lay down that the directors can neglect a notice informing them of circumstances which render it wrong for them to accept or recognise a transfer by the registered shareholder so as to defeat or prejudice rights of which they have been informed by the notice. This is, I think, in accordance with the view expressed by Lord Westbury in *Ex parte Stewart* (11). In my opinion, where the board have actual knowledge of circumstances which shew a claim, though an equitable one, to shares, it would be their duty to refuse to register a transfer by the shareholder, apparently in violation of the rights of which they have knowledge, until they have investigated the conflicting claims, or have given notice to the person whose claims are apparently inconsistent with the proposed transfer. The company are not bound to recognise trusts, and in my opinion cannot be made liable for accepting a transfer by any notice not to allow a transfer, or by any knowledge of the board of facts inconsistent in equity with the right to transfer. But here, as in most companies, it is part of the duty of the board to control the entries on the register. I do not say that the directors would in all cases be liable if they registered a transfer inconsistent with an equitable claim of which they have received notice, or that they are bound to keep a register or record of such notices; but where they are asked to register a transfer which, from circumstances in fact known to them at the time, would be in violation of the rights of others, in my opinion they cannot, either safely to themselves or without disregard of their duty, register the transfer.

The cases on the question whether shares are in the order and disposition of a bankrupt, which I shall hereafter examine, are inconsistent with the contention that notice to the board can be treated as a nullity, or as, under all circumstances, of no effect. But the question nevertheless remains, whether the principle as to priority established in *Dearle* v. *Hall* (22) is applicable to equitable assignments of shares in companies where, till an effectual instrument of assignment is executed, there can be no claim against the company, however complete in equity the contract of assignment may be as between the shareholder and his transferee. Where there is an assignment, available only in equity, of an interest in personalty vested in a trustee, or of a debt due to the assignor, there notice is necessary; for until notice is given the trustee can pay to his original *cestui que trust*, and the debtor may pay to his creditor. But after notice the trustee holds the fund in trust for the assignee, and the debtor cannot obtain a good discharge without the concurrence of the transferee. In equity, without any further act done by the assignor as against the trustee or debtor, there is a change of the person entitled to be considered the *cestui que trust* or creditor, and disregard of the assignment will in equity make the trustee or debtor liable. In a case like the present the company do not recognise, and are in no way bound to recognise, trusts, and there is no claim against the company unless and until the shares are effectually transferred. But the cases as to order and disposition are strongly relied upon by the plaintiffs, and must be considered. These decisions establish that in cases where shares in companies would otherwise be in the order and disposition of a bankrupt, the knowledge of the board previously to the bankruptcy of an existing equitable claim will prevent the shares from being within the order and disposition clause. Some of these decisions may be explained by the suggestion which has been made, that where the notice has been given by the person entitled to the equitable charge or interest, this, even though the notice were ineffectual, would establish that the shares were not left in the disposition of the bankrupt with the consent of the true owner. But this explanation cannot apply to the decision in the case of *The Agra Bank* (12), where no notice was given by the equitable incumbrancer but the directors had knowledge of the transaction. These cases therefore establish that notice to or knowledge of the board is effectual to prevent a subsequent transfer by the shareholder—that is, take them out of his

disposition. But in none of these cases was there any question as to the effect of notice on the priority of equitable incumbrancers, and in all cases the equitable incumbrance was of necessity prior in date to the title of the assignee. Moreover, in these cases, where in the absence of notice the title of the assignee in bankruptcy prevailed, nothing further remained to be done by the shareholder, inasmuch as where shares are in the order and disposition of a bankrupt, the Act gives the assignee in bankruptcy a right thereto. These cases therefore are quite satisfied by giving to a notice to the board of an equitable incumbrance on shares the effect of requiring the board not to register a subsequent transfer without enquiry whether it is in violation of rights created by the transferor. As already pointed out, there is an essential difference between the nature of shares and of an equitable assignment thereof, and that of *choses in action* properly so called and assignments thereof; and in my opinion we ought not to apply the rule established as regards the latter to a subject-matter of so different a nature, or to lay down that a prior equitable interest in shares is to be postponed to one later in date, merely because the person entitled to the latter has first given notice of his claim, unless we are compelled by decisions so to hold.

There is, I think, one decision only which can be quoted by the plaintiffs as in their favour, *Martin* v. *Sedgwick* (7). In that case, as reported, Lord Langdale held that the interest of *cestui que trust* of shares must be postponed to the claim of a person holding a security, apparently effectual only in equity, created by the trustee of the shares, of which he had given notice to the company, on the ground that the *cestui que trust* had given no notice to the company. If this was in fact the decision, this Court is not bound by it, and I think should decline to follow it; and indeed it must be considered as having been overruled by *Pinkett* v. *Wright* (23), affirmed in the House of Lords (24). But in the case of *Ex parte Boulton* (6) Lord Justice Turner expressed himself in terms which strongly support the plaintiffs' contention. Any opinion expressed by Lord Justice Turner is entitled to the greatest weight, but the opinion which he expressed was not necessary for the decision of the case before him, which was one under the order and disposition clause of the Bankruptcy Act, and no decision except that of *Martin* v. *Sedgwick* (7) could be quoted by the plaintiffs in support of the view thus expressed by the Lord Justice Turner. In my opinion we ought not to be induced, by respect for what he said, to apply the rule established in *Dearle* v. *Hall* (22) to dealings with property, to which in principle that rule is in our opinion not applicable.

In my opinion notice of an equitable claim to shares given to directors under circumstances like those of the present case gives no right as against the company, and operates only as a notice to them not to allow a transfer without giving the person of whose claim they have notice a reasonable time to enforce his claim; and that it is effectual only for a reasonable period, that is, for the time during which it must be presumed that the facts remain present to the minds of the directors, and that they ought to consider the claim as a continuing one, but that it in no way affects the priority *inter se* of those who have claims to the shares available only in equity.

LINDLEY, L.J.—The first matter for consideration is the title of the plaintiffs and of the defendants. The defendants' title is equitable only. They hold a blank transfer and the share certificates; but the legal title clearly is not in them. The plaintiffs' title is also equitable only. They held a transfer in blank, and then filled it up; but, notwithstanding the reference to it by the transferor in his letters of indemnity, the transfer in its complete state was never seen by him, nor is there any evidence to shew that he knew how it was filled up, or the state in which it was when it is contended that he ought to be treated as having redelivered it. Had there been such evidence I should have been prepared to infer a delivery after the transfer had been duly filled up, on the authority of the case of *Hudson* v. *Revett* (14). But as the evidence stands, I think such an inference

(23) 2 Hare, 120; 12 Law J. Rep. Chanc. 119.
(24) 12 Cl. & F. 764.

ought not to be drawn; and Mr. Justice Lopes, who tried the case and heard the evidence, arrived at the same conclusion. The plaintiffs, therefore, must be treated as having only an agreement to transfer, and not as the legal transferees of the shares by virtue of a deed duly executed by the transferor.

The titles of both parties being equitable, the next point to determine is their priorities. The defendants contended that they were entitled to priority: first, because their security was first in point of time, and they gave notice of it to the company before the plaintiffs gave the company notice of their security; and, secondly, because even if they did not, still their security was first in point of date, and they have done nothing which entitles the plaintiffs to say that they have acquired a better right than they to the legal ownership of the shares. The plaintiffs, on the other hand, contend that they are entitled to priority over the defendants: first, because they first gave notice of their security to the Tramways Union Company; and, secondly, because even if this is not sufficient, still, by reason of the conduct of J. S. Walker and the defendants, the plaintiffs have acquired a better right than they to the legal ownership of the shares.

It will be convenient first to consider the question whether the tramways company had notice of the defendants' security before the plaintiffs gave notice of their security. The notice alleged to have been given to the company of the defendants' security was given as follows: Mr. J. E. Walker, who was secretary of the Tramways Union Company, was present at the funeral of Mr. J. S. Walker. On that occasion the agreement creating his security was read; and Mr. J. E. Walker said in his evidence that he recollected the clause in the agreement relating to the shares, because it interested him as secretary to the company; but he also stated that he did not consider the notice at the funeral an official notice. Under these circumstances Mr. Justice Lopes held that what took place at the funeral was not notice to the company of the defendants' security, and I entirely concur in his decision on this point. The secretary was in no way representing the company at the funeral; no notice was given to him as the agent of the company, nor did he acquire any knowledge of the defendants' security whilst transacting the company's business, or in any way for or on behalf of the company. It appears to me, therefore, impossible to treat the company as having acquired through him notice of the defendants' security before the plaintiffs gave notice of theirs.

I proceed now to consider whether the plaintiffs obtained priority over the defendants by first giving notice to the company of their security and requiring the company to register them. Mr. Justice Lopes decided this point in favour of the plaintiffs. The point thus raised is one of very great importance, and it is surprising to find how little authority there is upon it. It becomes necessary, therefore, to examine it carefully upon principle.

In the first place it is necessary to bear in mind that we have to deal with a company registered under the Companies Act, 1862, and not with a company which is a mere partnership, with transferable shares, not governed by any statute. Shares in companies governed by the Companies Act, 1862, are declared by section 22 to be personal estate capable of being transferred in manner provided by the regulations of the company. The interest of a shareholder is a legal, not an equitable interest; and this legal interest is capable of legal transfer. The form of transfer —*e.g.* whether it is to be by deed or not—depends on the regulations of the company. In this particular company a deed was necessary. When a shareholder entitled to transfer his shares has duly executed a proper transfer to an unobjectionable transferee who has duly accepted a transfer, the transferee has a legal right to the shares transferred, and he can compel the company by legal as distinguished from equitable proceedings to recognise his title, and can compel the company by legal proceedings taken in his own name to register him as a shareholder. In this respect shares are different from debts, and by reason of this difference it has been held, and I think properly, that shares in companies governed by the Companies Act, 1862, are not *choses in action* within the meaning of the reputed owner-

ship clause, section 15 of the Bankruptcy Act, 1869—*Ex parte The Union Bank of Manchester* (5). Shares in companies are no doubt often spoken of as *choses in action*; but that expression, which was originally confined to debts, has unfortunately been gradually extended to all incorporeal personal property — *e.g.* to Government annuities, copyrights, and patents. (See *Williams on Personal Property*, 7th edition, p. 6.) But if shares in companies registered under the Companies Act, 1862, are spoken of as *choses in action*, care must be taken not to overlook the fact that their transferee has a legal and not merely an equitable right to become a shareholder.

If a shareholder in a company governed by the Companies Act, 1862, does not transfer his shares, but agrees to transfer them or to hold them upon trust for another either absolutely or by way of security, there can be no doubt as to the validity of the agreement, or as to the effect of it as between the parties to it. As between them the agreement or trust can be enforced; but as regards the company the shareholder on the register remains shareholder still; he is the person to exercise the rights of a shareholder, *e.g.* to vote as such, to receive dividends as such, and to transfer the shares. On the other hand, he and he alone is liable for calls, and to be put on the list of contributories if the company is wound up. The person having the beneficial interest in the shares has as against the company no right to them; he has as against the company no right to have them registered in his name. But it is necessary to consider another matter —namely, the effect of a notice given to a company by a *cestui que trust* or equitable mortgagees of shares in it; and in particular it is necessary to consider whether, after such a notice, the company can properly decline to permit the registration of a transfer by the registered holder of the shares. It is obvious that the question is one of the utmost importance, not only to equitable owners and mortgagees of shares, but also to companies; for whilst, on the one hand, if the notice is valueless, an equitable owner or mortgagee will be at the mercy of the registered owner; yet, on the other, if the notice operates as a stop on the transfer of the shares, companies must be careful to preserve such notices, and not to disregard them. A very onerous duty will be thrown upon them, for they will in this case not only have to keep a register of shareholders and of transfers, but in some shape or other a register of notices of equitable interests.

Now if we turn to the Companies Act, 1862, we shall find enactments requiring companies governed by it to keep a register of members (sections 25 to 37). Moreover, upon the production of a proper transfer duly executed, either a transferor or a transferee can require the company to substitute the name of the transferee for that of the transferor on the register (see Companies Act, 1862, s. 35, and Companies Act, 1867, s. 26). Provision is also made for the registration of holders of share-warrants entitling the bearer to be registered as a member (Companies Act, 1867, s. 27 *et seq.*). There is, however, no provision in the Companies Act, 1862, or in any of the Acts amending it, requiring the company to keep any register of or to preserve any notice of any change in the equitable interest in shares. On the other hand, section 30 of the Companies Act, 1862, seems expressly intended to exonerate them from any such duty. That section enacts that "no notice of any trust, express, implied, or constructive, shall be entered on the register, or be receivable by the Registrar." In the face of these enactments it is difficult to hold that companies are bound to pay any attention to notices of equitable interests in shares. They are to be kept off the register; but the enactment is reduced to a mere regulation as to the form of a particular book if notices of trusts, although kept out of it, are to be preserved elsewhere by companies, and to be attended to by them. I cannot put so narrow a construction on this section.

Article 22 of the Tramways Union Company is more emphatic than section 30 of the Act. [The learned Judge read article 22.] In the absence of some statutory enactment entitling companies to ignore notices of equitable assignments, it is, to say the least, doubtful whether they can safely do so, even although they may attempt to entitle themselves so to do by agreement or otherwise—see *Williams* v.

Thorp (25). The section in question appears to me to remove this doubt, and to relieve companies registered under the Companies Act, 1862, from the duty of attending to mere notices of equitable interests. It must not be forgotten that a *cestui que trust* or equitable mortgagee of shares who is entitled to restrain a transfer can apply to the High Court, under 5 Vict. c. 5. s. 4, and Order XLVI., for an order restraining the company from allowing a transfer to be made; and this appears to me to be his only remedy where he is not himself a transferee, and, as such, entitled to be registered as a shareholder.

I wish to guard myself against being supposed to go too far. I have no doubt that, if directors allow a transferor to make a transfer which they know to be fraudulent, they could be made liable for the value of the shares transferred. They would make themselves parties to his fraud. Moreover, a refusal by directors or an omission on their part to pay attention to a notice given to them by a person having an equitable interest in shares, and requiring the directors not to register a transfer for such time as may be necessary to allow him time to apply for a proper restraining order, would be *prima facie* improper. Such conduct on the part of directors, unless explained, would be strong evidence of fraud on their part. But this is quite consistent with holding companies not bound to take notice of equitable interests in shares not followed up by proceedings to restrain a transfer.

It is said, however, that in *Ex parte Stewart* (11) Lord Westbury put a different construction on an enactment similar to section 30 of the Companies Act, 1862. In *Ex parte Stewart* (11) the directors of a company registered under the Companies Act, 1856, borrowed money for the company from its bankers. One of the directors, with the knowledge of the others, deposited the certificates of his shares with the bankers as a security for this loan, and afterwards became bankrupt. The bankers gave no notice of the deposit to the company, but all the directors knew of it; it was one of the conditions of their loan. The Joint Stock Companies Act, 1856, contained a section 19 similar to section 30 of the Companies Act, 1862, and it was contended by the assignees of the bankrupt that the notice which the directors had of the transaction did not bind the company and was nugatory; and that the shares belonged to the assignees as being in the order and disposition of the bankrupt with the consent of the true owners. Lord Westbury held that this contention could not prevail, for that, having regard to the notice which all the directors had of the deposit of the certificates with the bankers, it could not be said that the shares were in the order and disposition of the bankrupt with their consent. I need not read Lord Westbury's judgment, which will be found at pp. 547, 548.

It will be observed that Lord Westbury was careful to point out that the company was not bound to recognise the equitable title of which it might have notice; but he at the same time held, as a matter of fact rather than of law, that the notice involved in the transaction itself excluded the inference that the bankers permitted the bankrupt to continue the apparent owner of the shares. Under the circumstances of the case before Lord Westbury it would have been a gross breach of faith towards the bankers and against their own interests if the directors had allowed the shares to be transferred to the prejudice of the bankers. Lord Westbury's decision, therefore, was perfectly correct; but it is no authority for the general proposition that a company registered under the Companies Act, 1856 (or 1862), is bound to take notice of the beneficial interests in shares held by its members, or is bound to prevent a transfer by such members, simply because notice of a trust or equitable security is given to the company. I understand Lord Westbury's view to have been clearly contrary to such a proposition.

Ex parte Littledale (8) and *Ex parte Boulton* (6) shew that if shares in dock and railway companies are equitably assigned, but are left standing in the name of a bankrupt, they pass to his assignees under the order and disposition clause if no notice of the assignment is given to the company, but do not so pass if notice is given. In *Ex parte Littledale* (8) the giving of the notice was considered as essential to perfect the equitable title, and

(25) 2 Sim. 257.

as preventing a transfer by the registered shareholder (26). Now, as the Companies Clauses Consolidation Act contains a section exonerating the companies to which it applies from noticing trusts (and it did certainly apply to the company in question in *Ex parte Boulton* (6), and probably also to the others), these cases go a long way. In *Ex parte Littledale* (8), however, the attention of the Court was not called to the trust section; but in *Ex parte Boulton* (6) it was, and it is curious to observe how cautious the Court was. In *Ex parte Boulton* (6) it was contended that the company had notice of the assignment, but the Court held the contrary. There was therefore nothing in that case to take the shares out of the reputed ownership of the bankrupt. Lord Justice Knight-Bruce said, "whether the security could have been made safe against bankruptcy without a transfer I do not say; a transfer, however, was not promised, intended, or expected on either side." Lord Justice Turner said, "I understand this to mean, in substance: Assume that a notice to the company would have been effectual to take the shares out of the order and disposition of the bankrupt, still, as there was no notice, they were in his order and disposition."

The case of *Ex parte The Agra Bank* (12) appears at first sight to offer more difficulty. The Court of Appeal there held that shares registered in the name of a bankrupt were not in his order and disposition, inasmuch as the share certificates had been deposited by him with his bankers as a security for a loan, and the directors knew it, although the bankers had given no notice to the company of their security. The Court there came to the conclusion that the directors could not properly have permitted a transfer, and it certainly looks as if the Court thought that the company was bound to recognise the equitable title of the bankers. This may have been so as regards the company there in question. The company was called the San Pedro del Monte Silver Mining Company, and it does not appear under what statute, if any, it was formed. No statutory enactment relating to the non-recognition of trusts was referred to in argument or noticed by the Court. Under these circumstances it would not be safe to take this case as deciding more than that the shares there in question were not in the order and disposition of the bankrupt, inasmuch as the directors knew that the shares were not in fact the bankrupt's property.

There are many other decisions on the reputed ownership clause and its application to shares in companies; but they go no further than those I have noticed. When carefully examined, none of the cases on the reputed ownership clause decide that it is the duty of companies registered under the Companies Act, 1862 (or governed by any other statute containing such a clause as section 30), to attend to notices of equitable assignments of their shares. In the absence of authority to the contrary, it appears to me that as regards companies registered under the Companies Act, 1862, there is no such duty, and that to decide otherwise would be virtually to render section 30 of no practical value. It is the duty of such companies to attend to proper transfers, but not to notices of equitable titles or to notices not to transfer given by persons having equitable interests, unless they have obtained or are about to apply for a restraining order under the statute 5 Vict. c. 5, or an injunction.

If this view be correct, it follows that there is no room for the application to shares in such companies of the doctrines laid down in *Dearle* v. *Hall* (22), and according to which the assignee of a trust fund or debt must in order to protect himself give notice to the trustee or debtor, as the case may be, of the change that has taken place in the right to receive the fund or debt. If after such notice the trustee or debtor pays the original *cestui que trust* or creditor, he pays the wrong person, and is liable to pay over again. On the other hand, if no such notice is given, the trustee or debtor has no reason for not paying his original *cestui que trust* or creditor, and the assignee of the trust fund or debt has only himself to blame if such payment is made, and he loses the benefit of the assignment in his favour.

(26) See 6 De Gex, M. & G. 728, 734.

It is not difficult to see how similar reasoning can be applied to shares in companies not exonerated from the duty of recognising beneficial interests in their shares; and in *Cumming* v. *Prescott* (13) and *Martin* v. *Sedgwick* (7) the priorities of equitable incumbrances on shares were considered to depend on the priorities of the notices of them given to the companies. *Martin* v. *Sedgwick* (7), as reported, seems to have been erroneously decided, and to be contrary to *Pinkett* v. *Wright* (23), affirmed in *Murray* v. *Pinkett* (24). But whatever may be the case with respect to shares in companies not governed by the Companies Act, 1862, or by some similar statute, it appears to me that to extend the rule laid down in *Dearle* v. *Hall* (22) to shares in companies which are so governed, would be to mistake the principle of that decision, and to impose on companies by judicial decision duties and responsibilities from which the Legislature has relieved them.

The present case cannot, therefore, be decided against the defendants simply on the ground that they and the plaintiffs are both equitable incumbrancers, and that the plaintiffs were the first to give notice to the company of their charge.

It remains to consider what other grounds there are to entitle the plaintiff to priority. The defendants had the share certificates, and they relied on their possession of them, but they left the shares standing in the name of J. M. Walker; and if he had become bankrupt under the Bankruptcy Act, 1869, it is plain that the shares would have passed to his trustee as being in his order and disposition. Moreover, if he had executed a proper transfer to the plaintiffs, the plaintiffs would have acquired a legal right to have the transfer to them registered, if they gave the company a proper indemnity against the consequences of registering the transfer without the production of the certificate of the ownership of the transferor. The right to the shares passes by the transfer, and the articles of the company do not make the production to the company of the transferor's certificate a condition precedent to the registration of the transfer. See on this point *Ex parte Boulton* (6). But by reason of the execution in blank of the plaintiffs' transfer they had not acquired any legal right to be registered. They are driven, therefore, to rely on what is called some better equity than the defendants'. In other words, the plaintiffs must prove some conduct on the defendants' part which entitles them to priority. If the defendants had left the shares in J. M. Walker's name in order that he might deal with them, the plaintiffs would, I think, be entitled to succeed. But the defendants left the shares in J. M. Walker's name, not in order that he might dispose of them, but in order that he might continue to hold them. Again, if the plaintiffs had made enquiries of the company, and had ascertained that J. M. Walker was the apparent owner of the shares, and had then advanced money to him on the faith of his being the owner of the shares, the plaintiffs' case would have been stronger than it is. But the plaintiffs did not do this; they merely took a blank transfer as the best security they could get for a pre-existing debt. This does not prevent the plaintiffs from being *bona fide* purchasers for value; but as they did not even get the certificates, I doubt whether they can be treated as *bona fide* purchasers without notice. The truth is that they trusted entirely to J. M. Walker. The plaintiffs cannot truly say that they have been misled by the conduct of the defendants. There is no proof that they were so misled, nor that they had been in any way damnified by the fact that the defendants allowed the shares to stand in the name of their mortgagor. The plaintiffs, it is true, sold the shares before they got them, or the certificates of them; but the defendants cannot, in my opinion, be held responsible for the loss thereby sustained. It is well settled that as a general rule the purchaser of an equitable interest in property takes it subject to all prior subsisting equitable interests in it; and in my opinion the priorities in this case must be determined by that rule, or, in other words, by the maxim *Qui prior est tempore potior est jure*.

For the above reasons I come to the conclusion that the plaintiffs have not established any better equity to the shares than the defendants have, and in my opinion

the title of the defendants being the earliest must prevail. The appeal, therefore, must be allowed, and judgment be entered for the defendants, with costs both here and below.

Appeal allowed.

Solicitors—Michael Abrahams, Son & Co., for plaintiffs; Miller, Smith & Bell, for defendants.

[IN THE COURT OF APPEAL.]

BANKRUPTCY. 1885. Jan. 13. } *In re* FAITHFULL; *ex parte* MOORE.*

Bankruptcy Notice—"Final Judgment"—Judgment giving Costs and ordering an Enquiry as to Damages—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4 (*g*).

An adjudication of costs to the plaintiff contained in a judgment ordering an injunction and an enquiry as to damages against the defendant is a "final judgment for any amount" which may be the foundation of a bankruptcy notice under the Bankruptcy Act, 1883, *s* 4 (*g*).

Appeal from the order of Mr. Registrar Brougham refusing to make a receiving order.

The act of bankruptcy alleged was non-compliance with a bankruptcy notice given under the Bankruptcy Act, 1883, s. 4 (*g*), for the payment of 53*l.* for taxed costs payable by the debtor to the creditor in accordance with the judgment in the action in the Chancery Division of *Moore* v. *Faithfull*. The judgment in the action was to the effect that the partnership between the plaintiff and the defendant be declared to have been dissolved; that the defendant be perpetually enjoined from practising as a solicitor as therein mentioned; that an enquiry be made as to the damages payable by the defendant to the plaintiff; and that the defendant pay to the plaintiff his costs to be taxed.

Romer, Q.C., and *F. C. Willis*, for the creditor.—The Registrar was of opinion that the creditor had not obtained "final judgment" against the debtor because the enquiry as to damages was still pending, and because, in the words of Cotton, L.J., in *Ex parte Chinery; in re Chinery* (1), "a previously existing liability of the defendant to the plaintiff was not ascertained or established." Those words of the Lord Justice must be read in connection with the question in the case, which was whether a garnishee order was a "final judgment" within the meaning of this sub-section. The case is distinguishable, because in that case there was no judgment, but only an order. Similarly, *Ex parte Schmitz; in re Cohen* (2) is distinguishable, because in that case there was a compromise, and no judgment was given, the action being stayed by order on the defendants agreeing to pay the plaintiff's taxed costs. So in *Ex parte Whinney; in re Sanders* (3), the matter relied on as a final judgment was a "balance order" in the winding-up of a company. In *The Duke of Beaufort* v. *Phillips* (4) a decree for specific performance, with reference to the Master to compute interest and tax costs, and ordering the defendant to pay purchase-money, interest, and costs, was held to be a judgment debt for the purpose of charging lands.

H. Reed, for the debtor.—The judgment was not final, because the question of damages was reserved. The judgment corresponds to an interlocutory judgment according to the old common law practice in which the plaintiff signed judgment for his costs to be taxed and for damages to be ascertained by the sheriff. In *Cremetti* v. *Crom* (5) it was held that a defendant who had obtained an order dismissing the action for want of prosecution was not a judgment creditor so that he might examine the debtor with a view to attaching his debts. In *The Financial Corporation* v. *Price* (6) it was held that a common-law Court could not enforce a decree in Chancery by attach-

* *Coram* Selborne, L.C., Brett, M.R., and Cotton, L.J.

(1) 53 Law J. Rep. Chanc. 662; Law Rep. 12 Q.B. D. 342.
(2) 53 Law J. Rep. Chanc. 1168; Law Rep. 12 Q.B. D. 509.
(3) Law Rep. 13 Q.B. D. 476.
(4) 1 De Gex & S. 321.
(5) 48 Law J. Rep. Q.B. 337; Law Rep. 4 Q.B. D. 225.
(6) Law Rep. 4 C.P. 155.

ment of debts, and the judgment was to be enforceable in Chancery only. The order as to costs made by this judgment might have been modified afterwards by giving the defendant the costs incurred in regard to the damages so that he could set them off.

[SELBORNE, L.C.—I doubt whether there could be jurisdiction to do so unless those costs were reserved.]

The word "creditor" in section 4 (*g*) means a person who is a creditor before he begins his action.

THE LORD CHANCELLOR (EARL OF SELBORNE).—It is clear that this sum of money is due under a final judgment against the debtor. There has been a *litis contestatio* and a final judgment thereupon. That judgment is final because there is nothing more to be done upon it. It has been argued that the fact of the question of damages being referred for enquiry makes it the less final; but I think that is not so, as the right to costs is wholly independent of what may happen afterwards. That part of the judgment is not the less final because there is another part of it which is not final. The word "creditor" as used in section 4 (*g*) is not, in my opinion, confined to persons who are creditors before they begin their action, but means judgment creditors. The cases cited are not in point. A garnishee order is a form of execution—not a judgment. The case of the "balance order" is not this case. The liquidator is an officer of the Court and not a judgment creditor. The words "antecedent liability" in *Ex parte Chinery; in re Chinery* (1) must be read in reference to the case then before the Court.

BRETT, M.R.—If this were only an order, however final it was, it would not be a final judgment. But if it is an indivisible part of a final judgment, it is a final judgment within the section. Common-law judgments are not analogous to Chancery judgments, because at common law the judgment was simply for debt and costs, whereas in Chancery numerous directions are given. It is said that the judgment was not final because an enquiry was ordered. If the judgment had been reserved until the enquiry was made it might be so; but that was not so here. An order for payment of costs, being part of a final judgment, is a final judgment. The refined argument that under this section the creditor must be a creditor before he obtains his judgment, does not bear discussion. If that were so, judgments in actions of *tort* would be shut out altogether.

COTTON, L.J.—I am of the same opinion. The questions are—is this a judgment, and is it final. It is both. There are certain enquiries ordered, but they do not qualify that part of the judgment which is for an injunction and costs. The cases cited do not apply. Other parts of the section enable a man to be made bankrupt upon orders after execution has been issued. When I said in *Ex parte Chinery; in re Chinery* (1) that the judgment must be one whereby "a previously existing liability is ascertained," I was referring to the case then in question. In a judgment for a *tort* there is a previously existing liability, so that the words used were correct. It is true that a judgment for costs is not by itself a judgment on a previously existing liability, but when it forms part of a final judgment it is.

Appeal allowed.

Solicitors—Hamlin, Grammer & Hamlin, for creditor; Rogers & Chave, for debtor.

1884.
Dec. 9, 15.

THE GUARDIANS OF THE HOLBORN UNION (*appellants*) *v.* THE GUARDIANS OF THE CHERTSEY UNION (*respondents*).

Poor — Settlement — Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 *Vict. c.* 61), *s.* 34—*Residence of Young Children away from Parents—Intention of Parent as to Children's Residence—Settlement by Residence.*

[For the report of the above case, see 54 Law J. Rep. M.C. 53.]

[IN THE HOUSE OF LORDS.]

1884. Nov. 14, 17, 18. Dec. 5. } ANDERSON, TRITTON AND COMPANY *v.* THE OCEAN STEAMSHIP COMPANY.

Ship and Shipping—General Average—Contract binding on Shipowners—Liability of Cargo-owners to Contribution—Authority of Master.

A shipowner who has paid a salvage claim without action brought by the salvors may maintain an action for general average contribution against the owner of cargo. But in such suit the fact that the shipowner had by contract made by himself or his master become bound to pay the sum actually paid is not conclusive as to the whole amount being chargeable to general average. It is a question of fact to be decided at the trial whether any, and, if any, what sum is chargeable.

This was an appeal by the defendants from a judgment of the Court of Appeal reported 53 Law J. Rep. Q.B. 161; Law Rep. 13 Q.B. D. 651.

The action was brought by the respondents, owners of the steamship *Achilles*, against the appellants, owners of part of the cargo, to recover a general average contribution of 162*l.* 11*s.* 7*d.* in respect of services rendered by the steamship *Shanghai*, whereby the *Achilles* and her cargo were saved from loss.

The appellants by their statement of defence disputed their liability to contribute at all, and also the amount of their liability, if any, in respect of which they paid into Court 75*l.*

At the trial before Cave, J., no evidence was produced for the defence. Evidence was given by the plaintiffs of the following facts:—

On the 2nd of June, 1880, the *Achilles* being in danger on a shifting sandbank in the river Yangtze off Hankow in China, her captain signalled to the *Shanghai* for assistance. The *Shanghai* belonged to the China Navigation Company, whose agents at Hankow, Drysdale, Ringer & Co., were also the agents of the plaintiffs. The *Shanghai* had been directed by Drysdale, Ringer & Co. to render assistance to the *Achilles* when signalled, and accordingly took the *Achilles* in tow, but in the course of an hour and a half did not succeed in getting her off the bank. The towing hawser then snapped, with the result that the *Achilles* swung round and got clear of the sandbank without sustaining any damage.

No communication took place between the captains of the *Shanghai* and the *Achilles* as to the terms on which the assistance was to be rendered, but there was evidence that the captain of the *Achilles* knew of an agreement which existed between the China Navigation Company and the China Merchants' Company as to the amount to be charged by them respectively for assistance to vessels in distress. These two companies alone possessed steamers of sufficient power to assist ocean steamers in distress in the Yangtze. The agreement between them was that the charge for assistance, whether beneficial or not, should be a minimum of 10,000 taels for a period not exceeding twenty-four hours, in addition to the cost of repairing damage sustained by the relieving ship. The sum earned was to be divided between the two companies.

Four days afterwards the captain of the *Achilles* signed an agreement with the captain of the *Shanghai* dated the 2nd of June, whereby the services of the *Shanghai* were to be paid for in accordance with the arrangement between the China Navigation Company and the China Merchants' Company.

It was suggested that the captain of the *Shanghai* supposed at the time of rendering the service that no charge was intended to be made for it.

Subsequently in correspondence with the plaintiffs the China Navigation Company offered to reduce the amount charged, but this offer was not accepted by the plaintiffs.

By the average adjustment the sum of 10,000 taels with a commission of 250 taels was found to amount to 2,631*l.* 18*s.*, and further sums for repairs to the *Shanghai* and expenses brought the total to 2,691*l.* 19*s.* 6*d.*, the defendants' contribution to which, if the whole was properly chargeable to general average, was 162*l.* 11*s.* 7*d.*, the amount claimed in the action.

In answer to questions by Cave, J., at the trial, the jury found that the captain of the *Achilles* signalled to the *Shanghai* for assistance knowing her terms; that he had pursued a reasonable course in so doing; that the sum of 10,000 taels was a reasonable sum to pay. They were not asked and did not find whether the sum was reasonable as against cargo-owners.

The verdict was entered and judgment given by Cave, J., for the whole amount claimed.

The Queen's Bench Division on appeal entered judgment for the defendants; but their decision was reversed by the Court of Appeal and the judgment of Cave, J., restored.

The Solicitor-General (*Sir F. Herschell, Q.C.*) and *Cohen, Q.C.* (*J. G. Barnes* with them), for the appellants.—There was no agreement in fact to pay the sum demanded. The written document signed by the captain of the *Achilles* does not contain the terms of any contract made at the time of the service rendered. Though the captain of the *Achilles* knew of the arrangement between the China Navigation Company and the China Merchants' Company, the captain of the *Shanghai* supposed himself to be acting gratuitously; there was therefore nothing amounting to an agreement between them. If the owners of the *Shanghai* had sued in the Admiralty Division for salvage, could the respondents have set up any agreement?

Then even if there was an agreement in fact, it did not bind the cargo-owners to a general average payment. In the first place it is not a salvage agreement, the money charged being payable in any event, whereas salvage is paid only in the event of success. In a true salvage contract the cargo is directly liable to the salvors, not merely liable to indemnify shipowners; the ship is not liable for the cargo's share of the amount payable.

Secondly, the respondents would not have been compelled to pay this sum had they objected. The China Navigation Company were willing to take much less, and might have foregone payment altogether. The respondents, in the interest of cargo-owners, ought to have accepted the reduction offered; they had no right to charge the full amount against cargo unless they were compelled to pay it.

Thirdly, the agreement was against public policy, and not such as would be sanctioned in the Admiralty Division even against a shipowner. It is immaterial that the respondents may have been bound by reason of their ratification; that obviously could not affect the cargo-owners. Public policy is the only ground upon which salvage is allowed — *The Hector* (1), *The Clifton* (2), *The William Beckford* (3), and *The Glenduror* (4). The sum charged here was not a *quantum meruit*, but was fixed, without reference to the facts of the case, upon some average taken by the two river companies. It would have been treated as inequitable upon that ground—*The Medina* (5) and *The Waverley* (6). If then there was no agreement, there was no obligation on the shipowners to pay the whole amount. The right of salvors is a mere lien, not a right of action to recover salvage—*Abbott on Shipping*, part 6, chap. 2, s. 2 (p. 537, 12th ed.) There are only two cases in which a right of action was recognised—*Nicholson* v. *Chapman* (7) and *Newman* v. *Walters* (8), and the latter was not in fact an action for salvage, though so treated. The respondents ought to have allowed the salvors to sue in the Admiralty Division, where they would only have been held liable for the ship's proportion. They have no right to pay the whole and bring this action in the common law division.

Matthews, Q.C., and *Gainsford Bruce, Q.C.* (*H. D. Greene* with them), for the respondents, were directed to confine their argument to the questions, first, whether the agreement was against public policy; secondly, whether it was binding on cargo-owners, this involving the question whether it was reasonable.

Dealing first with the second question,

(1) 3 Hag. Adm. 90, 95.
(2) 3 Hag. Adm. 117, 120.
(3) 3 Chr. Rob. 355.
(4) Law Rep. 3 P.C. 589.
(5) 45 Law J. Rep. P., D. & A 81; Law. Rep. 2 P. D. 5.
(6) 40 Law J. Rep Adm. 42; Law Rep. 3 A. & E. 369.
(7) 2 H. Bl. 257.
(8) 3 Bos. & P. 612.

it is contended that if it was judicious at the time to make the sacrifice involved in the agreement the cargo was bound—*Birkley* v. *Presgrave* (9), *Kemp* v. *Halliday* (10), and *Moran* v. *Jones* (11). The jury have found that a reasonable necessity existed, and the sum paid was not unreasonable.

[LORD BLACKBURN.—Was it left to the jury whether the agreement was reasonable as against cargo, and have they found that it was?]

In finding it reasonable as against the ship, they have found it reasonable against all parties. The *Shanghai* incurred danger and suffered loss in assisting, and this fact is an element in considering whether the amount charged was reasonable—*The Waverley* (6) and *The Minnehaha* (12).

[THE LORD CHANCELLOR.—If the service had been rendered for twenty-four hours without result, would the cargo have been bound to contribute?]

In that case the fact that the service was not beneficial would take the case out of the category of general average. But this is an incident to the advantage of the cargo—*The Helen and George* (13) and *The Phantom* (14).

Then as to the first question, the jury have found that the captain acted reasonably in making the agreement, and it cannot be reasonable to enter into a contract against public policy.

Cohen, Q.C., in reply.—In *The Medina* (5) it must have been reasonable for the captain to make the agreement, as he had no other course to pursue; yet the agreement was held bad as against public policy—*The City of Chester* (15) and *The De Bay* (16).

Cur. adv. vult.

LORD BLACKBURN (on Dec. 5).—The first paragraph of the statement of claim is as follows:—

"In consideration that the plaintiffs, at the request of the defendants, had taken on board a ship of the plaintiffs' called the *Achilles* certain goods of the defendants to be carried on board of the said ship from Hankow to London, the defendants promised that they would contribute and pay their just share and proportion in respect of the said goods of any general average loss that might arise or happen to the ship during the said voyage." The statement then proceeds to aver that the ship with the goods on board took the ground, and that the ship and cargo were in danger of perishing, and that "her master and crew were unable to rescue the said ship or the said cargo from the said danger; help and assistance were obtained, and were necessary and proper for that purpose, for which the plaintiffs were obliged to pay, and did pay 2,691*l.* 19*s.* 6*d.*, and that the ship and cargo were by means of the said help and assistance preserved." If there was a general average to which the defendants were to contribute, it is not now in controversy that the defendants' proportion of 2,691*l.* 19*s.* 6*d.* would be 162*l.* 11*s.* 7*d.*, and for that sum the action was brought. There can, however, be, I think, no doubt that the plaintiffs are not tied down to recover that exact amount or nothing. If it was proved that there was a claim for general average, but that the amount for which the claim was made out was less than 2,691*l.* 19*s.* 6*d.*, the plaintiffs might still recover the proper percentage of that amount actually made out.

The defendants, by their statement of defence, put the plaintiffs on proof of everything; and contended, and I rather think still contend, that the plaintiffs are not entitled to recover anything. But they seem to have had doubts upon that subject, and therefore bring 75*l.* into Court. What the effect of this mode of pleading might be on the costs I do not stop to enquire. It certainly shews to my mind that besides the issue whether there was a general average at all, there was a serious issue as to what the amount was to which the cargo had to contribute as a general average.

I may as well clear away a matter of prejudice. If any one is insured in the

(9) 1 East, 220.
(10) 34 Law J. Rep. Q.B. 233, 242; 35 ibid. 156; Law Rep. 1 Q.B. 520.
(11) 7 E. & B. 523; 26 Law J. Rep. Q.B. 187.
(12) 1 Lush. 343.
(13) Swabey, 374.
(14) Law Rep. 1 A. & E. 58.
(15) 53 Law J. Rep. P., D. & A. 90; Law Rep. 9 P. D. 182.
(16) 52 Law J. Rep. P.C. 57; Law Rep. 8 App. Cas. 559.

ordinary form his insurers would have to indemnify him for general average. It is therefore usual enough for a merchant who is insured to hand over the defence to his insurers; if they can make out that the merchant is not liable at all, there is no claim on the insurers; if they can make out that the amount payable is less than demanded, the claim on the insurers is less. I think it very likely that in this case insurers are defending the action in the name of the defendants, though I do not know that it is so; but that makes no difference in the law, and should make none as to the findings of fact. No more contribution is exigible from the owner of a parcel of goods that are insured than from the owner of a parcel that is not insured.

On the trial evidence was produced on behalf of the plaintiffs only, the defendants calling none. At the close of the case it was submitted that there was no case, and various objections were taken. One of these I may now notice. There was evidence—I do not now say more—that not only the ship, but also the cargo, were exposed to a peril from which the master and crew were unable to rescue her; that the assistance of the *Shanghai* was requested and was granted; and there was evidence that by the assistance of the *Shanghai* the ship and cargo were saved from that peril. Mr. Cohen's objection, if I understood him rightly, was that, assuming all to be true which this could prove, it would shew a claim of salvage for which the owners of the *Shanghai* might have brought a suit in the Court of Admiralty against the ship and cargo, and that in that Court the amount of the fair reward would have been decided by the Judge of the Admiralty, having consideration as to everything: the peril to the *Shanghai*, which does not seem to have been great, being one element, and the sum which the owners of the *Shanghai* in all cases demanded being another, but not a conclusive one. But I think this was not a tenable point. The owners of the *Achilles* paid the amount demanded by the *Shanghai* as a disbursement; after they had been paid the owners of the *Shanghai* could not have brought any suit. And I think it would be a very unjust rule of law that the cargo-owners should go free from a payment which they might have been forced to make to the *Shanghai* because the owners of the *Achilles* did not put the *Shanghai* to a suit in the Court of Admiralty, but, rightly or wrongly, paid as a disbursement the whole amount demanded. I do not think that the owners of the *Achilles* could by paying the claim of the *Shanghai* entitle themselves to recover more from the goods owners than the *Shanghai* could have recovered in a salvage suit against the goods owners, but I do not see why they might not recover whatever it was fair and just should be paid as a contribution.

General average, as is explained in *Abbott on Shipping*, part 3, chap. 8 (p. 342 of the 5th edition—the last published in Lord Tenterden's life), is founded on the Rhodian law, which, however, in terms did not extend further than to cases of jettison; but its principle applies, and it has been applied to all other cases of voluntary sacrifice for the benefit of all—that is, if properly made. Those things which are actually saved in the sense explained in *Abbott on Shipping*, part 3, chap. 8, section 13, 5th ed., p. 355, must contribute.

In *Kemp* v. *Halliday* (10) I said: "In order to give rise to a charge as general average it is essential that there should be a voluntary sacrifice to preserve more subjects than one exposed to a common jeopardy, but an extraordinary expenditure incurred for that purpose is as much a sacrifice as if instead of money being expended money's worth were thrown away. It is immaterial whether the shipowner sacrifices a cable or an anchor to get the ship off a shoal, or pays the worth of it to hire those extra services which get her off. It is quite true that as long as the expenditure by the shipowner is merely such as he would incur in the fulfilment of his ordinary duty as shipowner it cannot be general average." And I may observe that in the specimen of an adjustment given in *Abbott on Shipping*, part 3, chap. 8, section 16, p. 359, 5th edition, and sanctioned by Lord Tenterden's high authority, one of the items allowed is "expense of bringing the ship off the sands, 50*l*." That item must have been a disbursement to pay for services hired.

I think that the promise stated in the first paragraph of the statement of claim is one that would be implied by law in every contract for the carriage of goods. The shipowners have, I think, a lien till the contributions are paid or secured. The goods owner may raise the question whether any, and, if any, what contribution is due, by offering to pay what, if anything, he admits to be due; demanding the goods, and, if refused, bringing trover; and so raising the question whether he has been ready and willing to pay enough. But I see no reason why the same question should not be raised in this form of action. Questions of this sort are generally more conveniently settled by average adjusters as arbitrators, or by stating a case on any question of law on which the opinions of average adjusters differ; but the action, having been brought, must be disposed of.

I have come to the conclusion that, on the evidence given at the trial, it was not a simple issue whether the whole sum actually paid by the shipowners to the owners of the *Shanghai* was chargeable to general average, and, if that was not made out, that nothing was to be recovered.

I do not think that it would follow merely from the shipowner having become liable to pay, and having paid that sum, that the whole of it was chargeable to general average. I think it might well be that on this evidence the proper conclusion was that something differing from that sum might be chargeable, and I think that till it is ascertained whether any sum was chargeable, and what that sum was, the case is not ripe for decision. And I do not think that the answers by the jury to the questions asked by the learned Judge at the trial suffice to enable this House to solve that question.

I have therefore come to the conclusion that neither the judgment given by Mr. Justice Cave in favour of the plaintiffs for the whole amount, nor the order of the Divisional Court entering judgment for the defendants, nor the order now appealed against restoring the judgment below, can be supported, and that the only course that can be adopted by this House is to order a new trial.

The principles on which I come to this conclusion have not often been discussed in a Court of law; they probably often come before average adjusters, and are of great importance.

The contract of the shipowner is to carry on the goods to their destination. In *Beldon* v. *Campbell* (17) it is said by Baron Parke, with, I think, perfect accuracy, "There is no doubt of the power of the master by law (but some as to what extent it goes) to bind the owner. The master is appointed for the purpose of conducting the navigation of the ship to a favourable termination, and he has as incident to that employment a right to bind his owner as to all things necessary; that is, upon the legal maxim, *Quando aliquid mandatur, mandatur et omne per quod pervenitur ad illud.*" And I think that if the question here raised had been whether the owners of the *Achilles* were bound by a contract made by their master to pay the owners of the *Shanghai* the sum in question, the first questions asked by Mr. Justice Cave would have been perfectly right. I do not, however, think that on the evidence any question of the authority of the master to bind his owners really was raised. The two sets of shipowners had a common agent, Drysdale, Ringer & Co.; and I should rather conclude that Drysdale, Ringer & Co. were the persons who on behalf of the owners of the *Shanghai* agreed to send out the *Shanghai* to help the *Achilles* as soon as the master of the *Achilles* signalled that he wanted help, and that the amount of remuneration to be paid by the owners of the *Achilles* to the owners of the *Shanghai* was not discussed or settled between the captains at all, but was settled in the first instance by Drysdale, Ringer & Co., and afterwards the two sets of shipowners ratified and agreed on what they settled. I think, therefore, that it was quite clear that there was a contract binding on the owners of the *Achilles* to pay this sum of 2,691*l.* 19*s.* 6*d.* to the owners of the *Shanghai*; whether it was made by themselves or by their master for them is, as far as regards the binding of the owners of the *Achilles*, unimportant. But neither the owners of the ship nor their master have authority to

(17) 6 Exch. Rep. 886; 20 Law J. Rep. Exch. 342.

bind the goods, or the owners of the goods, by any contract. The master has, I think, authority to make for his owners all disbursements which are proper for the general purposes of the voyage; and when once those disbursements are paid for, either by the master out of funds belonging to the owners which the master has, or by funds which the owners themselves apply to discharge a contract which they either could not dispute because the master had bound them to make it, or did not choose to dispute, I think that the disbursement, in so far as it is a disbursement for the salvation of the whole adventure from a common imminent peril, may properly be charged to general average. But I think that there is neither reason nor authority for saying that the whole amount which the owners of the ship choose to pay is, as a matter of law, to be charged to general average. And though I quite agree that there is some evidence here that the *Achilles* and her cargo were both in danger and were both saved by the services of the *Shanghai*, and though I also agree that it is not a question of law whether the amount of the sum charged as a disbursement was exorbitant or not, still I cannot find that any question as to the amount was submitted to the jury.

It seems to me that if such a question had been submitted to a jury, there is much in the evidence that might make it very doubtful whether the jury would think this sum properly chargeable against the owners of the goods if uninsured. If they thought the charge was against underwriters, there is a common enough impression, not confined to jurymen, that the underwriters' trade is such as to make it right to be liberal in deciding any doubtful question against them. I do not think this ought to influence, but it might do so. I cannot, however, find that the opinion of the jury was taken at all as to the amount. On a new trial that question may be raised, and it may be a subject of great difficulty to say what evidence bears on it, and what the proper direction to the jury should be. I think it better not to prejudice the question further than by saying that the fact that the owners of the *Achilles* had by contract, made either by their master or by themselves, become bound to pay this sum, and had paid it, is not, I think, conclusive that the whole of it was chargeable to general average, though part of it may be.

If your Lordships agree in this opinion, I think that the order of this House should be for a new trial, and that all the costs of the trial, and in the Divisional Court and in the Court of Appeal, are thrown away; and that, as neither party can be said to have succeeded in this House, each party should bear his own costs in this House.

I therefore move accordingly.

THE LORD CHANCELLOR (EARL OF SELBORNE.)—I agree in the opinion which has just been delivered by my noble and learned friend, and do not desire to add anything to it. The way in which I propose to put the question to the House is this: that the order appealed from be reversed except so far as it rescinds the order of the Queen's Bench Division to enter judgment for the defendants; that the case be remitted to the Court below with directions for a new trial; and that there be no costs of the appeal.

LORD WATSON.—I concur, and have nothing to add to what has been said by my noble and learned friend Lord Blackburn.

Order appealed from reversed except so far as it rescinds the order of the Queen's Bench Division to enter judgment for the defendants.

Case remitted to the Court below with directions for a new trial.

Solicitors—Waltons, Bubb & Walton, for appellants; Flux, Son & Co., for respondents.

[IN THE COURT OF APPEAL.]

BANKRUPTCY. 1884. Nov. 21. } *Ex parte* HEYWORTH; *in re* RHODES.*

Bankruptcy—Bankruptcy Petition—Act of Bankruptcy—Failure to comply with Bankruptcy Notice in respect of Judgment Debt—Appeal from Judgment Pending—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 7, *sub-s.* 4.

By s. 7, *sub-s.* 4, *of the Bankruptcy Act*, 1883, *on a creditor's petition for a receiving order, when the act of bankruptcy relied on is non-compliance with a bankruptcy notice to pay a judgment debt, the Court may, if it thinks fit, stay or dismiss the petition on the ground that an appeal is pending from the judgment.*

Where the Registrar has exercised his discretion by staying proceedings on a petition pending an appeal from the judgment on which it is founded, the Court of Appeal will not interfere unless it is very clear that such appeal is frivolous and not bona fide.

This was an appeal against a refusal of Mr. Registrar Hazlitt to make a receiving order on a bankruptcy petition presented by Heyworth against Rhodes, on the ground that an appeal was pending in relation to the judgment on which the petition was founded.

In an action in the Mayor's Court Rhodes had obtained a judgment against Heyworth, but in an action in prohibition to determine whether the cause of action alleged by Rhodes had arisen within the jurisdiction of the Mayor's Court, Hawkins, J., decided that the Mayor's Court had no jurisdiction, and gave judgment for Heyworth with costs.

Rhodes having failed to pay the costs in the prohibition action, Heyworth served him with a bankruptcy notice in respect of them, and his failure to comply with such notice was the alleged act of bankruptcy upon which the petition was founded.

Rhodes appealed against the decision of Hawkins, J., and his appeal was pending at the date of the hearing of the petition, in consequence of which the Registrar adjourned the further hearing generally with liberty to apply.

Heyworth now appealed.

Rolland, for the appellant.—The petition ought not to have been adjourned merely because there was an appeal pending from the judgment; or at least the debtor ought to have been ordered to give security for the judgment debt—*Ex parte Phippen* (1).

Morton Smith, for the debtor.—There is a substantial question raised by the appeal—that is, whether the action was within the jurisdiction of the Mayor's Court.

BAGGALLAY, L.J.—It was always the recognised practice under the Bankruptcy Act, 1869—and I can see no reason why it should not continue to be the practice under the present Bankruptcy Act—that, when a petitioning creditor's debt was founded on a judgment (and I assume that the present appellant's debt is a judgment debt), and an appeal was pending from the judgment, it was a matter for the discretion of the Registrar whether he would at once adjudicate the debtor a bankrupt, or stay the proceedings on the petition pending the appeal. In the present case the petitioning creditor's debt is an amount payable to him by the debtor by reason of certain proceedings in prohibition. Against the judgment or order under which that sum is payable an appeal is pending, and a possible result of the appeal is that there may be no petitioning creditor's debt at all. I do not stop to consider whether this is a probable result or not, but the *bona fide* character of the appeal is an essential matter to be considered. If the Court was satisfied that the appeal was not *bona fide*, the discretion under sub-s. 4 of section 7 ought to be exercised by making a receiving order on the petition. In the present case it appears to me that there is a substantial question raised by the appeal, and I think the Registrar has exercised his discretion very wisely. He has not adjourned the petition until after the appeal has been heard, he has only adjourned it generally with liberty to apply; so that if the appeal is not duly prosecuted, the petitioner can

* *Coram* Baggallay, L.J., Bowen, L.J., and Fry, L.J.

(1) Law J. Notes of Cases 1883, p. 57.

apply to the Court to allow him to proceed with the petition. I think the Registrar's order is perfectly right.

BOWEN, L.J.—I am of the same opinion. Assuming that the appellant is right in saying that these costs are payable to him under a "final judgment" within the meaning of sub-s. 1 (*g*) of section 4—though I express no decided opinion on that point now—the judgment of Hawkins, J., is under appeal, and the question is, whether the pendency of this appeal justified the Registrar in ordering the petition to stand over for the present. This was an exercise of the Registrar's discretion. It cannot, of course, be said that the mere fact that an appeal is pending from the judgment gives the debtor an absolute right to a stay of proceedings or to have the petition dismissed. But under sub-s. 4 of section 7 the Registrar is clothed with a discretion; he has an absolute discretion to consider what is the best thing to be done under the circumstances. And it would be impossible for this Court to interfere with the exercise of his discretion unless we were satisfied that he could not have been right. If it could be shewn that the appeal from the judgment was a frivolous one, we might reverse his decision. But so long as he might reasonably have come to the conclusion that there was a reasonable ground of appeal, it would be a monstrous thing that a receiving order should be made while the appeal is pending.

FRY, L.J.—I am entirely of the same opinion. In all cases of this kind I should be very unwilling to interfere with the exercise of the Registrar's discretion. But in the present case I think he has exercised his discretion rightly. If the appeal from the judgment appeared to be an entirely frivolous one, the proceedings on the petition ought not to be stayed; but that is not so here. The present appeal, however, is entirely frivolous, and it must be dismissed with costs.

Solicitors—Shaw & Tremellen, for the creditor; Walker, Son & Field, for the debtor.

1885. Jan. 15.

SAUNDERS *v.* PAWLEY.

Practice—Power to abridge Time appointed—Notice of Trial—Order XXXVI. rule 12; *LXIV. rule* 7.

The lapse of the six weeks from the close of the pleadings allowed by Order XXXVI. rule 12 *to a plaintiff is a condition precedent to the exercise by a defendant of the power to give notice of trial under that order; and the Court cannot give the defendant leave to exercise that power before the expiration of the six weeks, which period is not a "time appointed by the rules" within Order LXIV. rule* 7.

This was an appeal from chambers.

The pleadings in the action closed on the 9th of December, 1884, and on the 27th of December the defendant applied to a Master for an order "that if the plaintiff does not give notice of trial for the next ensuing Surrey Assizes, then the defendant may give short notice of trial for such assizes"—namely, 20th of January, 1885.

The Master refused to make the order, on the ground that the Court had no power to abridge the period named in Order XXXVI. rule 12 (1), and the Judge affirmed the Master.

E. Clarke, Q.C. (*Morton Smith* with him), for the defendant.—The Court has power to accede to this application under Order LXIV. rule 7 (2), which applies to all times fixed by the rules.

(1) Order XXXVI. rule 12: "If the plaintiff does not within six weeks after the close of the pleadings, or within such extended time as the Court or a Judge may allow, give notice of trial, the defendant may, before notice of trial given by the plaintiff, give notice of trial, or may apply to the Court or Judge to dismiss the action for want of prosecution, and on the hearing of such application the Court or a Judge may order the action to be dismissed accordingly, or may make such other order, and on such terms as to the Court or Judge may seem just."

(2) Order LXIV. rule 7: "The Court or a Judge shall have power to enlarge or abridge the time appointed by these rules, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed."

Saunders v. *Pawley.*

McCall, for the plaintiff.—This is in effect an application to abridge the period of six weeks given to the plaintiff by Order XXXVI. rule 12 (1), which the Court has no power to do. The terms of the order shew that the Court has power to extend the time, but no mention is made of any abridgment of time. The rules have given the plaintiff an absolute and vested right to have a period of six weeks in which to get ready for trial, and no power is given to the Court to shorten this period. Order LXIV. rule 9, giving the Admiralty Court express power to abridge the time for giving notice of trial, shews that an express power is necessary, and that the power given by Order LXIV. rule 7 (2) is not enough; this period is not a "time appointed" within that rule. There is no time appointed for giving notice of trial; the plaintiff may give notice any time he likes, but if he does not do it within the six weeks the Court may give the defendant leave to do it, but not before that date—*Curtis* v. *Sheffield* (3), *Eaton* v. *Storer* (4), and *Pilcher* v. *Hinds* (5).

GROVE, J.—I have come to the conclusion, with great regret, that our judgment must be for the plaintiff. Though I do not accede to the greater part of the contention for the plaintiff, I do not think that the cases cited in support of it have any bearing upon the question before us; they are not decisions upon the former rule corresponding to Order LXIV. rule 7 (2), and although in those and similar cases the Court has in general exacted a strict compliance with the rules, still it has nowhere been laid down that the Court has no power under any circumstances to dispense with such compliance, and there is nothing in any of those cases to shew that the Court cannot abridge or enlarge time where a strong case is made out that it is necessary for the ends of justice that it should do so. Most of those cases were of such a nature that no harm was likely to result if the application was refused, and in all of them the applicant had some other remedy open to him.

In the present case there will be a serious injury to the defendant if the Court has not the power which the defendant says it has under Order LXIV. rule 7 (2). I, however, do not think we have any such power, and I come to this conclusion with very great regret, because I think the result will be a great hardship to the defendant. The plaintiff has had ample time to prepare his case, and he has not treated the defendant at all well.

I must, however, yield to the argument last addressed to us for the plaintiff, that Order LXIV. rule 7 (2) does not apply to this case at all, for the defendant is not really asking us to abridge a time appointed by the rules. By Order XXXVI. rule 12 (1) the defendant is given a power which no other rule or order gives him—namely, in a certain event to give notice of trial—and we are now asked to give him that power, but without the condition affixed to it by the rule, that is, before the happening of that event. The power of the defendant to give notice of trial at any time is under this rule conditional upon the expiration of the time limited to the plaintiff. Can the Court give the defendant that power before that time has expired, and so give him a power which the rules do not give him? I think it cannot. The power is peculiar and exceptional, and given upon a condition, which condition has not been fulfilled in the present case, for the time has not expired. The appeal must therefore be dismissed.

LOPES, J.—I concur, though I regret that we cannot accede to the defendant's application, for all the merits of the case are on his side. Under Order XXXVI. rule 12 (1) no time is named within which the plaintiff must give notice of trial; he can do so when he pleases, but if he does not do so within six weeks from the close of the pleadings, then the defendant may give notice himself, but not till the expiration of the six weeks. We are now asked to give him leave to do this before that period has elapsed. The Court has no power to do this. Order LXIV. rule 7 (2) gives no such power; that rule does not apply to this case. Certain times are appointed by the rules within which cer-

(3) 51 Law J. Rep. Chanc. 535; Law Rep. 21 Ch. D. 1.
(4) Law Rep. 22 Ch. D. 91.
(5) 48 Law J. Rep. Chanc. 512; Law Rep. 11 Ch. D. 905.

tain steps must be taken, as, for instance, pleadings delivered, and Order LXIV. rule 7 (2) is intended to apply to those cases. But there is no time appointed for the delivery of notice of trial; an indulgence is given to a defendant only upon default by the plaintiff, and if we were to make this order, we should be giving the defendant that indulgence before the plaintiff has made default. This we have no power to do.

Appeal dismissed.

Solicitors—G. R. Dodd, for plaintiff; P. K. Langdale, for defendant.

1885. Jan. 24.

ALLAN *v.* THE REGENT'S CANAL, CITY AND DOCKS RAILWAY COMPANY AND OTHERS.

Company — Separate Undertaking — Separate Capital—Liability to General Creditors—Solicitor.

Where the solicitors of the promoters of an Act of Parliament, whereby a company is created and empowered to raise capital and carry out works, and, if they so resolve, to raise separate capital for and carry out separately certain portions of such works as a separate undertaking, agree to pay certain claims out of the first capital raised by the company, and the company duly raise capital for the separate undertaking and none other, neither the company nor the solicitors are liable under the agreement.

This was an action tried in Middlesex before Mathew, J., without a jury.

The defendants, the Regent's Canal, City and Docks Railway Company, were a company created by a bill introduced into Parliament in the session of 1882, and passed in that session as the Act 45 & 46 Vict. c. cciv., and the defendants Higginson and Vigers acted as solicitors of the promoters of the bill.

The object of the bill was to create a company with power (*a*) to purchase and work the canal undertaking of the existing Regent's Canal Company, and (*b*) to construct railways and other works by the side of the canal and extending to docks on the Thames.

The plaintiff, as a landowner whose premises might be affected by the railways and other works proposed to be carried out by the defendant company if the bill passed, presented a petition against the bill in order to obtain a protective clause therein.

By an agreement in writing, dated the 4th of May, 1882, the defendants Higginson and Vigers undertook "to pay out of the first capital raised" by the defendant company the costs incurred by the plaintiff in relation to his petition.

By section 67 of the defendant company's Act, 45 & 46 Vict. c. cciv., it was provided as follows:—"The company may, before creating any part of the capital by this Act authorised, resolve and determine that the canal undertaking [meaning the canal and works of the Regent's Canal Company], and the capital necessary for the purposes of that undertaking, shall be a separate undertaking and a separate capital respectively of the company; and, in the event of the company so determining, the company may create such capital as a separate capital (which separate capital is hereinafter referred to as 'the canal capital')"; and by section 68, which made general provisions as to the canal capital, it was, amongst other things, provided that "(*D*) All mortgages or debenture stock to be granted or issued by the company in respect of the canal capital under the powers of this Act shall be a charge exclusively upon the canal undertaking; and no other mortgages or debenture stock granted or issued by the company shall be a charge upon the canal undertaking;" and "(*H*) It shall not be lawful for the holders of shares or stock in the general capital of the company to interfere with the expenditure of the canal capital or in any other matter affecting that capital or the canal undertaking."

By section 147 of the Act it was provided that the company should not, without the previous consent of the plaintiff, take any part of certain of his premises.

No land of the plaintiff had been taken under section 147 of the Act or been otherwise affected.

Allan v. *Regent's Canal Co.*

The defendant company duly acquired the canal and other works of the Regent's Canal Company, but before doing so duly resolved that such canal and works should be a "separate undertaking" with separate capital, and they had accordingly issued this capital for such separate undertaking, but had issued or raised no other capital. And by an Act passed in 1883 the resolutions of the defendant company as to this separate undertaking and separate capital and the issue of this capital (which had been as stock and not as shares) were confirmed.

The action was brought by the plaintiff under the agreement of the 4th of May, 1882, to recover the costs incurred by him in relation to his petition.

The defendants denied that any capital had been raised by the defendant company within the meaning of the agreement.

Finlay, Q.C., and *Morten*, for the plaintiff.

The Solicitor-General (*Sir Farrer Herschell*) and *Seward Brice*, for the defendants.

Finlay, Q.C., in reply, submitted that if the company raised any capital which was put beyond the reach of the plaintiff there was a breach of the undertaking by Higginson and Vigers, and the latter were therefore in any case liable to the plaintiff.

MATHEW, J., having stated the facts as above set forth, said:—It seems to me that by "first capital raised" was meant capital legally applicable to the purpose of paying these costs, and the only capital which may be so applied is railway capital. Now the capital which has been raised by the company is canal capital, and there are distinct provisions as to what that capital is applicable to. None of it is applicable to railway purposes. It seems to me that it was contemplated by the agreement that the costs should be paid out of railway capital, and therefore my judgment must be for the defendants.

Judgment for defendants, with costs.

Solicitors—Routh, Stacey & Castle, for plaintiff; Higginson & Co., for defendants.

1884. Dec. 15. } MILLWARD v. THE MIDLAND RAILWAY COMPANY.

Master and Servant — Negligence of Fellow-servant—Employers' Liability Act, 1880 (43 *& 44 Vict. c.* 42), *s.* 1, *sub-s.* 3.

By section 1, *sub-section* 3, *of the Employers' Liability Act*, 1880, *it is provided that where personal injury is caused to a workman by reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform and did conform, where such injury resulted from his having so conformed, the workman, or, in case the injury results in death, the legal personal representatives of the workman, . . . shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of the employer, nor engaged in his work.*

The plaintiff, a boy of fourteen, was in the service of the defendants, and acted as guard of a van driven by H., a carman, also in the defendants' employ. Inside this van were three large iron window-frames, which were placed upright in the van, and were secured in that position by two pieces of string, one piece being tied at each end round the hoops supporting the covering of the van. H. commenced unloading the frames by untying the string near the tail end of the van, and the plaintiff, who was inside at the front of the van, untied the other string. H. then pulled one of the frames away without retying the other two, leaving them standing. Directly afterwards the two frames fell upon the plaintiff, inflicting upon him severe injuries. The plaintiff stated that he untied the string at one end without any orders from H., because he, the plaintiff, had done so on other occasions, and that H. saw him untie it and made no objection. The plaintiff having sued the defendants for damages under the Employers' Liability Act, 1880,—Held, *on the above facts, that there was evidence to go to the jury of liability on the part of the defendants under section* 1, *sub-section* 3, *of that statute.*

This was a Special Case stated by the Judge of the Derby County Court, before whom and a jury the action was tried.

Millward v. *Midland Rail. Co.*

The action was brought under the provisions of the Employers' Liability Act, 1880, to recover compensation for personal injuries received by the plaintiff whilst at the defendants' goods station at St. Pancras, on the 12th of September, 1883.

The following particulars were annexed to the summons served upon the defendants:—

"The plaintiff demands of the defendant company damages for personal injuries caused to him at the St. Pancras Railway Station of the defendant company, on the 12th of September, 1883, by the falling upon him of an iron framework or casting, whilst in the performance of his duties in the defendant company's employ, through the negligence of the defendant company, or their servant, Alfred Hicks, a carman. The plaintiff claims 100*l*."

Upon the trial the following evidence was adduced on behalf of the plaintiff:—The plaintiff stated that he was fourteen years old, and was employed by the defendants as a van-guard. His duties were to keep watch over the goods in his van, to attend to the horse, and when not so engaged to assist in unloading. He went to his duties at the St. Pancras goods station on the morning of the 12th of September, 1883. He was the guard of a van driven by a man named Cross, but he arranged with his brother, who was the guard of a van driven by a man named Alfred Hicks, that he (the plaintiff) should go out with Hicks's van in place of his brother, it being a customary thing for van-guards to change with each other. He did not know whether Hicks consented, but he rode in the van with him when it started work in the morning to the platform of the goods station without any objection from him, and the van was then backed to the platform. The van was put in that position in order that three large iron window-frames, which had been left in it on the previous night, might be unloaded and put on the platform. These frames, as stated by the plaintiff, were about seven feet long by five feet broad. They had been placed upright inside the van, and were secured in that position by two pieces of tarred string, one piece being tied at each end round the hoops supporting the covering of the van. When the van had been placed in the position described, Hicks stepped inside and began to unload. He untied the string near the tail end of the van, and the plaintiff, who was inside at the front of the van, untied the other. He was not asked by Hicks to do so. Hicks began to pull one of the frames away without re-tying the other two, leaving them standing. Directly afterwards the two fell upon the plaintiff, severely injuring his head, and rendering him insensible. He was taken to the Royal Free Hospital, where he remained seven weeks.

In cross-examination the plaintiff stated that he lost his senses, and could not say whether or not Hicks was in the van when the frames fell on him. In answer to a question by the learned Judge, the plaintiff said, "Hicks did not say anything to me or I to him. I untied one end without any orders from Hicks because I had done so on other occasions. He saw me untie it, and made no objection."

At the conclusion of the plaintiff's case it was submitted that there was no evidence to support an action under any of the sub-sections of section 1 of the Employers' Liability Act, 1880. The learned Judge held there was not, except under sub-section 3. It was then contended that there was no evidence that Hicks was a person to whose orders or directions the plaintiff was bound to conform, or that the plaintiff met his injuries from having conformed to any order or direction from Hicks. It was also contended that the plaintiff was a volunteer in what he did, and was not entitled to recover; that the plaintiff's own contributory negligence was the cause of the accident; and that, upon the whole, there was nothing to be left to the jury.

The Judge, however, decided to leave the case to the jury, who found a verdict for the plaintiff for 30*l*., notwithstanding that evidence was called by the defendants to contradict the plaintiff.

The questions for the opinion of the Court were:—

1. Was there evidence under sub-section 3 of the plaintiff having been injured by reason of the negligence of a person in the service of the defendants to whose orders he was bound to conform and did conform,

and that he was injured by his having so conformed (1)?

2. Was there not evidence upon the plaintiff's case that the plaintiff in what he did acted as a volunteer?

3. Was there not upon the plaintiff's case such evidence of contributory negligence that the Judge ought to have nonsuited?

Smyley, for the defendants.—Under subsection 3 of section 1 of the Employers' Liability Act there must be a specific order; here there was none.

[DAY, J.—An implied order would be sufficient.]

It is contended that in order to create a liability there must, at all events, be something equivalent to an order or direction. Secondly, even assuming an order, the plaintiff was not bound to conform to it; and even if he was, the injury of which he complains must have been done whilst conforming to it. It is submitted in this case that there was no evidence to shew that he conformed with the order (if any), nor yet that there were no means of doing so except by exposing himself to danger.

J. H. Etherington Smith, appeared for the plaintiff, but was not called upon to argue.

MATHEW, J.—Our judgment in this case must be for the plaintiff. Notwithstanding Mr. Smyley's able argument, it appears to me that there are really no difficulties in the case, and that there was clear evidence to go to the jury under 43 & 44 Vict. c. 42. s. 1, sub-s. 3. The plaintiff was called upon to go in company with a man named Hicks, both of them being in the service of the defendants, to assist in unloading three frames from a van. These frames had, it appears, been placed upright inside the van, and were secured in that position by two pieces of string tied at each end of the van. Hicks commenced the unloading by untying the string near the tail end of the van, while the plaintiff, who was inside at the front end of the van, untied the other string. Hicks then began to pull one of the frames away without tying the two other frames up again; the consequence was that these frames fell upon and injured the plaintiff. On these facts I am of opinion that there was evidence of negligence on the part of Hicks to go to the jury, and also that Hicks was a person to whose orders the plaintiff was bound to conform, and was conforming at the time of the injury.

Then did the injury result in consequence of conformity on the part of the plaintiff to Hicks's orders? Mr. Smyley has suggested that the injury did not necessarily arise from Hicks's negligence, and that the plaintiff had been guilty of contributory negligence inasmuch as he might if he chose have placed himself in such a position as to avoid injury in case the frames fell. But no proof to justify any such inference on our part was given at the trial in the County Court. The defendants did call two witnesses, who stated that the carman retied the two frames, and that the injury to the plaintiff happened a considerable time afterwards, the suggestion being that the plaintiff had himself untied them meanwhile; but the jury discarded these statements, and all the other evidence they gave helped to establish the plaintiff's case. For these reasons I think that the County Court Judge was right in leaving the case to the jury, and that the verdict given in favour of the plaintiff ought to stand.

DAY, J.—I am of the same opinion.

Judgment for plaintiff.

(1) By 43 & 44 Vict. c. 42. s. 1, sub-s. 3, "Where after the commencement of this Act personal injury is caused to a workman . . . . by reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform and did conform, where such injury resulted from his having so conformed, . . . the workman, or, in case the injury results in death, the legal personal representatives of the workman, and any person entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work."

Solicitors—G. P. Rogers, for plaintiff; Beale, Marigold & Co., for defendants.

[IN THE COURT OF APPEAL.]

1885. Jan. 26, 27, 28. } THE ATTORNEY-GENERAL *v.* BRADLAUGH.*

Parliament—Parliamentary Oaths Act, 1866, *ss.* 1, 3, *and* 5—*Promissory Oaths Act*, 1868—*Penalties—Voting in House of Commons without Making and Subscribing Oath—Person having no Religious Belief—Incapacity of, to take Oath—Practice of House of Commons as to taking Oath—Admissibility of Evidence of—Trial at Bar—New Trial—Motion for—Notice—Civil Proceeding—Appeal—Judicature Act*, 1873, *ss.* 19 *and* 47.

An information by the Attorney-General to recover penalties incurred under the Parliamentary Oaths Act, 1866, *is not a criminal cause or matter within the meaning of section* 47 *of the Judicature Act*, 1873, *so as to preclude a defendant from appealing against the judgment of the High Court at bar.*

A person who does not believe in a Supreme Being, and is one upon whose conscience an oath, as an oath, has no binding force, is wholly incapable of taking the oath prescribed by the Parliamentary Oaths Act, 1866, *as amended by the Promissory Oaths Act*, 1868.

The oath required to be taken by section 1 *of the Act of* 1866, *as amended by the Act of* 1868, *is to be taken by a member not once only in the same Parliament, but every time a member after being elected and returned takes his seat.*

Under section 3 *of the Act of* 1866 *the oath must be taken and subscribed by a member with all the due solemnities used in Parliament, but so as no debate or business be interrupted by such member.*

Any member who takes his seat without taking the oath within the meaning of the Act is liable to the penalties imposed by the Act, even though the House of Commons itself were not only not to refuse him leave to be sworn, but were actually to pass a resolution permitting him to be sworn.

Statements and avowals of a defendant as to his belief in a Supreme Being, and as to whether an oath, as an oath, has any binding force upon his conscience, are admissible in the trial at bar of an action for penalties under the Parliamentary Oaths Act, 1866, *even though such statements or avowals were made before he was elected a member of the Parliament in which he sat and voted.*

Evidence of the usages and practice of the House is also admissible to explain the meaning of the Act and standing orders of the House with regard to making and subscribing the oath.

Where an information to recover penalties under the Act of 1866 *has been tried at bar, a motion for a new trial must not be made ex parte, but upon notice of motion to the other side.*

Information filed by the Attorney-General on behalf of the Crown to recover penalties incurred by the defendant under the Parliamentary Oaths Act, 1866, as amended by the Promissory Oaths Act, 1868 (1).

The counts of the information were to the following effect:—

The first count stated that the Attorney-General, on behalf of the Queen, demanded

(1) The preamble to the Parliamentary Oaths Act, 1866 (29 Vict. c. 19), declares it to be expedient that one uniform oath should be taken by members of both Houses in Parliament on taking their seats in every Parliament. Section 1 gave a form of oath, which was altered by the Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72).

By section 3, "The oath hereby appointed shall in every Parliament be solemnly and publicly made and subscribed . . . . by every member of the House of Commons at the table in the middle of the said House, and whilst a full House of Commons is there duly sitting with their Speaker in his chair, at such hours and according to such regulations as each House may by its standing orders direct."

By section 5, " . . . . if any member of the House of Commons votes as such in the said House, or sits during any debate after the Speaker has been chosen, without having made and subscribed the oath hereby appointed, he shall be subject to a penalty of 500*l.* for every such offence, and in addition to such penalty his seat shall be vacated in the same manner as if he were dead."

By standing order, dated the 30th of April, 1866, "Members may take and subscribe the oath required by law at any time during the sitting of the House before the orders of the day and notices of motion have been entered upon, or after they have been disposed of, but no debate or business shall be interrupted for that purpose."

* *Coram* Brett, M.R., Cotton, L.J., and Lindley, L.J.

of the defendant the sum of 500*l.* for that whereas he, having been duly elected to serve for Northampton, and being a member of the House of Commons, did, on the 11th of February, 1884, vote as such member in the House without having made and subscribed the oath by the Parliamentary Oaths Act, 1866, as amended by the Promissory Oaths Act, 1868, appointed against the form, &c., whereby he became subject to a penalty of 500*l.*

The fourth count charged the defendant for that he, being such member as above mentioned, did not on the day, and at the place, and in the manner as in the last count mentioned, make and subscribe the above-mentioned oath at such hour and according to the regulations as the House did by its standing orders direct—that is to say, at any time during the sitting of the House before the orders of the day and notices of motion had been entered upon, or after they had been disposed of, and without any debate or business being interrupted for that purpose against the form, &c.

The fifth count stated "that . . . . the Attorney-General, on behalf of the Queen, demands of the said Charles Bradlaugh one other sum of 500*l.* of lawful money, which he, the said Charles Bradlaugh, owes to and unjustly detains from the Queen, for that whereas he, the said Charles Bradlaugh, having been heretofore duly elected to serve as a member of the Commons House of Parliament for the borough of Northampton, and being a person having no belief in a Supreme Being, and being a person upon whose conscience an oath, as an oath, has no binding force (of all which said matters the said House then had full cognisance and notice by means of the avowal of the said Charles Bradlaugh), did afterwards, to wit on the 4th day of February in the year aforesaid, go through the form of making and subscribing the oath appointed by the Parliamentary Oaths Act, 1866, as amended by the Promissory Oaths Act, 1868, and did thereafter, to wit on the 11th day of February in the year aforesaid, upon one other occasion, being such member as aforesaid, vote as such member in the said House and without having made and subscribed any oath save as aforesaid," against the form of the above-mentioned statutes, whereby he became subject to a penalty of 500*l.*

At the trial at bar before Lord Coleridge, C.J., Grove, J., and Huddleston, B., and a special jury it appeared that on the 11th of February, 1884, whilst the Speaker was in the chair, and after the notices and questions had been disposed of, the defendant approached the table, and directly he reached it, although the Speaker rose up and called, "Order, order," proceeded to read a paper which he had in his hands, and which contained the words, "I, Charles Bradlaugh, do swear I will be faithful and bear true allegiance to her Majesty Queen Victoria, her heirs and successors according to law. So help me God," and having read it, kissed a New Testament which he had brought with him, and then signed his name to the paper. Sir Erskine May, on behalf of the Crown, gave evidence as to the practice and usages of the House, as to the effect of the Speaker standing up and calling, "Order, order," as to signing the test roll, as to the administration of the oath by the clerk, and as to other matters connected with the practice of the House. Evidence was also given that in May, 1880, the defendant made a claim to affirm instead of taking the oath, that a committee of the House was appointed to enquire into the matter, and that in June, 1880, they recommended that the defendant should not be allowed to take the oath, but that as the right of the defendant to affirm could be tested by an action he should not be prevented from making and subscribing the affirmation; that the House subsequently passed a resolution that the defendant should not be permitted to take the oath or make an affirmation, that the defendant presented himself at the table and made an affirmation, and that in an action—*Clarke* v. *Bradlaugh* (2)—it was decided that he could not make an affirmation. The Crown also put in the statements made in 1880 by the defendant before the committee, and a letter written in May, 1880, by him as to the effect an oath had upon him. The Journals of the House as records of what took place were also produced and put in on behalf of the Crown.

(2) 50 Law J. Rep. Q.B. 342; Law Rep. 7 Q.B. D. 38.

The jury, in answer to questions put to them by the Court, found—that the Speaker was sitting when the defendant came up to take the oath; that he was sitting for the purpose of preparing notes of what he was about to say in addressing the defendant; that he had not resumed his seat for the purpose of allowing the defendant to take the oath; that the Crown had satisfied them that on the 11th of February, 1884, the defendant had no belief in a Supreme Being; that on that day he was a person upon whose conscience an oath had no binding force; that the House had full cognisance of these matters by his own avowal; that he did not take and subscribe the oath according to the full practice of Parliament, and that he did not take and subscribe the oath as an oath.

Upon these findings judgment was entered for the Crown for 1,500*l.*, being 500*l.* each on the first, fourth, and fifth counts. The Divisional Court (Lord Coleridge, C.J., Grove, J., and Huddleston, B.) having refused to grant a rule *nisi* for a new trial or to enter judgment for the defendant on the ground of misdirection, improper reception of evidence, and the verdict being against evidence, the defendant subsequently applied *ex parte* to the Court of Appeal for a rule, and to move in arrest of judgment, upon the ground that the fifth count was bad in law.

The Court of Appeal, after taking time to consider, granted the application.

The Attorney-General (*Sir H. James, Q.C.*), and *Sir H. Giffard, Q.C.* (with them *The Solicitor-General* (*Sir F. Herschell, Q.C.*), *R. S. Wright*, and *Danckwerts*), for the Crown, took a preliminary objection to the jurisdiction of the Court to hear the appeal.—No appeal can be brought, for this case is a criminal cause or matter within the meaning of sections 19 and 47 of the Judicature Act, 1873, so that the Court of Appeal has no jurisdiction to hear it. This is an information to recover a penalty under 29 & 30 Vict. c. 19. ss. 3 and 5, and in section 5 the penalty is stated to be a penalty "for such offence." The earlier statutes relating to the same subject—5 Eliz. c. 1, and 30 Car. 2. st. 2. c. 1—were highly penal, and the statute now in force was passed in substitution of those statutes. The test is, whether the act upon which the information is based arises out of a contract or a personal right or a breach of a public right to which by a public statute a penalty is affixed. If section 5 had stopped at the words "five hundred pounds," then the offence would plainly be an indictable misdemeanour. The fact that the penalty is to be recovered by an action does not prevent the proceeding being a criminal cause or matter. This point was not raised in *Clarke* v. *Bradlaugh* (2), for it was not necessary to do so inasmuch as in that case the plaintiff himself appealed; and, further, that was a suit by a private individual who sued for a debt due to him, whereas the present case is an information by the Crown for a penalty for an offence against the statute. The Crown in fact sues on behalf of the public, and seeks to impose a penalty and punishment. *The Attorney-General* v. *Radloff* (3) was an action in a Court of revenue for a penalty, and the Court was equally divided in opinion; but the judgments of Pollock, C.B., and Parke, B., are in point, and contain strong arguments supporting the view that such a proceeding as this is a criminal matter. The Crown Suits Act, 1865 (28 & 29 Vict. c. 104), removed the difficulty as far as relates to the question of evidence. No doubt the Crown has a prerogative right to sue for the penalty by action instead of proceeding by information; but in the present case the Crown has taken proceedings which are criminal. In cases of libel there may be an action, or there may be an indictment, or in certain cases an information, but none the less are these two latter proceedings purely criminal. *Mellor* v. *Denham* (4) was held to be a criminal matter, and that was a decision on an information for contravening the by-laws of a school board; and in *Ex parte Whitchurch* (5) an order made under the Public Health Act, 1875, was held to be an order made in a criminal cause or matter. In *Bradlaugh* v. *Clarke* (6) Lord FitzGerald says

(3) 10 Exch. Rep. 84; 23 Law J. Rep. Exch. 240.

(4) 49 Law J. Rep. M.C. 89; Law Rep. 5 Q.B. D. 467.

(5) 50 Law J. Rep. M.C. 99; Law Rep. 7 Q.B. D. 534.

(6) 52 Law J. Rep. Q.B. 505; Law Rep. 8 App. Cas. 354.

that the 29 & 30 Vict. c. 19 "creates a new public misdemeanour, imposing a penalty as a punishment." If it be urged that, in cases to which the provisions of Jervis's Act apply, the Justices must, if default be made in payment of the fine imposed, commit to prison, and that there is no alternative given, still it is to be observed that the Act (11 & 12 Vict. c. 43) gives the Justices power to deal with civil matters as well as with criminal matters, that the payment of the fine relieves the person from liability to imprisonment, and that the imprisonment is not punitive, but merely to enforce payment of the fine. But whether imprisonment does or does not follow the payment of the penalty is not the real test; if it were, then the defendant in this case would be liable to be taken in execution for non-payment of the penalty —*West on Extents*, c. 13. p. 82—for 33 Hen. 8 provides that all suits for debts to the Crown shall be made by *capias*, &c.— *Sir William Harbart's Case* (7).

The mode of proceeding adopted to recover the penalty makes no difference, so that the words in 29 & 30 Vict. c. 19. s. 5, "to be recovered by action in one of her Majesty's superior Courts at Westminster," do not make the proceeding a civil action, for the word "action" includes suits by the Crown in a Court of revenue. "There are two kinds of actions, *placita coronæ et civilia*—*Co. Lit.* 284*b*. Pleas of the Crown are those which contain offences done against the Crown and dignity of the king"—*Com. Dig.* tit. "Action," D. "Actions are divided into criminal and civil"—*Bac. Abr.* "Actions," tit. A; and the remarks of Lord Selborne, L.C., on this point in *Bradlaugh* v. *Clarke* (8) point to the same conclusion as does the decision in *The Queen* v. *Hymen* (9).

There is a further objection to the jurisdiction of this Court. The trial in this case was a trial at bar. A motion was afterwards made for a new trial and was refused. This motion was made to the Judges who tried the case at bar; but whether to them in that capacity or to them sitting as a Divisional Court of the Queen's Bench Division is not clear: it is not, however, desired to press any technical point which may turn on that distinction. A trial at bar is in theory a trial before the whole Court, and no application can be made to the Court to review its own decision—so that if the defendant did in fact apply to a Divisional Court, it had no power to hear the application; if the application was to the Court as the Court which heard the case at bar, then there is no "judgment or order" of the Court within section 19 of the Judicature Act, 1873, from which an appeal can be brought. The points raised by the defendant are that there was misdirection and misreception of evidence; there is no order or judgment of the Court on those points, therefore no appeal lies to this Court from a ruling at a trial on these points. The remedy, if any, is by application to the Divisional Court; but as in this case there could be no such application, it could not be heard and granted, or refused—so that there is no order or judgment of the High Court from which an appeal can be brought. A new trial was moved for after a trial at bar in *The Queen* v. *Castro* (10); but Blackburn, J., expressly said that the Court desired to guard itself against the supposition that it was competent for the Court to rehear and reconsider points of law already decided by the same Court when sitting at bar. This is not an appeal from a judgment of the Court on the findings of the jury, nor is it because the verdict was against the evidence— *Musgrave* v. *Nevinson* (11). If the remedy of the defendant is by error, then the fiat of the Attorney-General is necessary.

The defendant in person, contra.—The Crown Suits Act, 1865 (28 & 29 Vict. c. 104), provides by section 22 that the Court of revenue shall be deemed to be a Court of civil judicature within the Common Law Procedure Act, 1854, section 103; and section 31 applies certain sections of that Act to the Court of revenue, and those sections are sections which apply to civil proceedings, as is expressly provided by section 103 of that Act. The statute under which the penalty is sought to be recovered shews that the proceeding is civil

(7) 3 Rep. 12.
(8) Law Rep. 8 App. Cas. at p. 361.
(9) 7 Term Rep. 536.
(10) 43 Law J. Rep. Q.B. 105; Law Rep. 9 Q.B. 350.
(11) 2 Ld. Raym. 1358.

and not criminal, for the action may be brought in any one of the superior Courts, and the Court of Common Pleas certainly had no criminal jurisdiction. The information itself shews that it is a civil proceeding. The judgments of Martin, B., and Platt, B., in *The Attorney-General* v. *Radloff* (3) are strongly against the view that such a case as this is a criminal matter. *Miller* v. *Salomons* (12) was an action to recover a penalty under 1 Geo. 1. st. 2. c. 13. s. 17 for voting without having taken the oath. The proceedings in that case were treated as civil proceedings, and the nature of this action is shewn by that statute to be a civil action, and the present statute has not altered the character of the action. In *Mellor* v. *Denham* (4) the penalty sought to be recovered had to be recovered under 11 & 12 Vict. c. 43, whereas there is no such provision in the present case; and in *Ex parte Whitchurch* (5) the Justices who made the order to abate the nuisance could have imposed a fine—so that both those cases can be distinguished from the present, for an order made under 11 & 12 Vict. c. 43 is not in the nature of a civil judgment. Order LVIII. of the Rules of Court as to appeals applies only to civil proceedings, and it includes revenue proceedings. 22 & 23 Vict. c. 21. s. 19 abolishes the writ of error in revenue proceedings. There is nothing in the judgment of the House of Lords in *Bradlaugh* v. *Clarke* (6) which decides that an action for such a penalty as this is a criminal proceeding.

[BRETT, M.R.—We do not desire to hear argument on the point whether an appeal lies from a decision of the Court on a trial at bar. We think that if the present proceeding is not a proceeding in a criminal cause or matter we can entertain an appeal from a trial at bar, and, if necessary, grant a new trial.]

The Attorney-General, in reply.—In *Miller* v. *Salomons* (12) the plaintiff was specially authorised by the words of the statute to bring a civil action. The provisions of the Common Law Procedure Act, to which reference has been made, shew that the proceedings are really criminal, and because they are of that nature certain exceptions are specified in respect of which they are to be treated as though they were civil proceedings, thus establishing that the Legislature considered them to be criminal.

[BRETT, M.R.—The Court is of opinion that it has jurisdiction to entertain the appeal, and will give its reasons when judgment is given on the whole case.]

The Attorney-General.—It would appear then that the defendant ought now to move in arrest of judgment, as the Crown has no knowledge of the grounds on which that motion is based.

[BRETT, M.R.—The defendant can state shortly the grounds on which he desires to move in arrest of judgment on the fifth count of the information.]

The defendant.—The fifth count is bad in law, for it alleges against the defendant matters which are not made an offence by the statute. That count alleges that the defendant is a person having no belief in a Supreme Being; but this is not an offence within the Parliamentary Oaths Act, 1866. That Act divides members into two classes only, those who are allowed to affirm and all other persons. By the statute all who cannot affirm are required and authorised to take the oath. Further, the count alleges that the defendant went through the form of taking the oath; but there is no distinction in law between taking the oath and going through the form, and the statute does not say that a person who in form takes and subscribes the oath does not in fact and law do so. The fifth count alleges a disability which is not created by the statute.

The Attorney-General and *Sir H. Giffard, Q.C.*, for the Crown.—The questions raised on what is treated as the rule *nisi* refer more expressly to the first and fourth counts. The first count is general, and under it evidence could be given on any ground to shew the defendant had not properly taken the oath. The fourth count avers that the defendant had not solemnly and publicly subscribed the oath pursuant to the statute and the standing orders. The substance of the question raised by the fourth count is whether a member can, without the invitation or sanction of the House, administer the oath to himself and so validly take it. The Act of 1866 directs that the oath shall be solemnly and publicly made according

(12) 7 Exch. Rep. 475; 21 Law J. Rep. Exch. 161; in error, 8 Exch. Rep. 778; 22 Law J. Rep. Exch. 169.

to certain provisions and according to the standing orders. What the defendant did was not sufficient to satisfy the requirements of the Act and the standing orders, and he is therefore liable to the penalty. The defendant did not subscribe the oath within the meaning of 29 & 30 Vict. c. 19, he did not solemnly and publicly subscribe it, and he interrupted the business of the House. Sections 3 and 5 must be read together, one giving the time and manner of taking the oath, and the other the penalty for not taking it.

It is urged by the defendant that there was a misreception of evidence on the ground that evidence of the usage and practice of Parliament was admitted; but that evidence shews what is the meaning of the words in the statute; the question of its weight when admitted may be the subject of comment. There is written and unwritten law of Parliament, and evidence was properly admitted to shew what the Speaker did, what the meaning of his acts and words were, and what was the regular result of that action and those words. The Journals of the House were properly put in to shew the sequence of events, and no inference prejudicial to the defendant is sought to be drawn from them. The Journals are records of the House, and are evidence of the acts done in Parliament in relation to a member; but, further, the correctness of the facts in them was proved by a witness.

It is further urged that if a member were elected several times in one Parliament he need take the oath only once; but the statute says that the oath shall be taken in every Parliament, and not once in every Parliament; and the meaning of "every Parliament" is that the statute is to apply to all future Parliaments.

The words "make an oath" and "take an oath" are used indiscriminately, and no distinction is to be drawn between them; but no one can make or take an oath without the assent of the person before whom it is made or taken, and if he does so the oath is not legally administered — *The King* v. *The Duke of Bedford* (13). An oath must be administered, and the House has by statute power to administer oaths, and it must be administered according to the known practice of the House, else it is not duly administered—*The King* v. *Ellis*, cited in a note to *The King* v. *Courtenay* (14). A person who has not a belief in a Supreme Being as a being who will punish falsehood cannot take an oath. *Omichund* v. *Barker* (15) contains the law upon this subject. The averment in the fifth count, "of which the House of Commons had due notice," is an immaterial averment, and really relates to a question of evidence and a mode of proof. *Jacobs* v. *Layborn* (16) and *Miller* v. *Salomons* (12) were referred to.

The defendant, contra.—There is a distinction in law between promissory and judicial oaths, between official oaths and oaths of witnesses, between oaths of allegiance and all other oaths. The only disability to take an oath of allegiance is that defined by statute, and the matters alleged in the information do not come within that definition. 1 & 2 Vict. c. 105 enacts that a person taking an oath is bound by it if it has been administered in such form and with such ceremonies as the person may declare to be binding; the defendant to this information has made such a declaration. Therefore the Court ought to have directed the jury that the oath was binding on the defendant. 30 & 31 Vict. c. 75 shews that an oath need not involve any religious test. The defendant was, in fact, obliged to take an oath, and he cannot be bound by statute to do that which in fact he cannot do. If a member does not take the oath or his seat he is, under 29 & 30 Vict. c. 19, in fact liable to be indicted; and although the modern legislation on this point is mild compared with the earlier legislation, still the obligation to take the oath remains.

It is urged that a member cannot take the oath without the invitation of the Speaker, or against the order of the House; but there was no order of the House preventing the defendant from doing so, and the invitation of the Speaker is not necessary. The Speaker cannot interfere with

(13) 1 Barnardiston, 280.

(14) 9 East, 246, at p. 252.

(15) Willes, 538; 1 Wils. 84; 1 Atk. 21; 1 Sm. L.C. 7th ed. 455.

(16) 11 Mee. & W. 685; 12 Law J. Rep. Exch. 427.

a member coming to take the oath, and a member coming to do that does not interrupt the business. The defendant obeyed every direction of the statute; and, if so, the law considers the oath duly taken, as may be gathered from the definition of "perjury" in *Hawkins' Pleas of the Crown*, vol. i. p. 429. The defendant subscribed his name beneath the words of the oath, and no evidence but that of the standing orders can be admitted to shew that he did not do so validly. The oath was publicly subscribed, and the word "solemnly" has no especial or religious meaning. No evidence of any practice ought to have been received other than that which was necessary to illustrate the meaning of the Act and the standing order; but evidence was wrongly received as to the signing of the test roll, as to the administration of the oath by the clerk, as to the Speaker calling the members to the table, and as to various other matters. When the Speaker stands up, a member who is in the act of taking the oath cannot sit down, for if he does, even accidentally, he forthwith, according to the practice of Parliament, is liable to vacate his seat—*Sir John Leech's Case* (17). Next, there was no interruption of the business other than the attempt to take the oath. The rules of proceeding prior to 1866 are laid down in *Hatsell's Precedents of Parliament* (18), and if that practice still exists there could be no interruption of business, because there was then none other than that of the defendant taking the oath. The cases of *The King* v. *The Duke of Bedford* (13), *The King* v. *Courtenay* (14), and *The King* v. *Ellis* (14) do not apply here, because the House of Commons have no judicial functions to perform; the only condition is that the act of taking the oath cannot be performed except when the House is duly sitting. In *Blackie* v. *The Presbytery of Aberdeen* (19), where the Presbytery were required to be present on the induction of Professor Blackie into office, Lord Cuninghame points out that the Presbytery had no judicial or deliberative functions to perform, and that their presence was only required to see the genuine copy of the confession of faith as sanctioned by Parliament subscribed without alteration. So here, the House have to be sitting, but they have no judicial or deliberative functions to perform. The document of the 3rd of May, 1880, was not admissible, being evidence of an act done by the defendant prior to his election as member. Evidence of words spoken by third persons in the absence of the defendant ought not to have been received; the Journals of the House on that point also ought not to have been admitted, for that evidence goes to all the answers given by the jury. The Crown were bound to, but did not, give the best available evidence that the defendant between the 4th of March, 1882, and the 11th of February, 1884, had not taken and subscribed the oath; the best evidence would have been that of Sir Erskine May or the clerk of the House or one of the assistant clerks—*Powell* v. *Milbank* (20) and *Williams* v. *The East India Company* (21). Then the words "So help me God" are merely words of asseveration, and not a portion of the oath; it is only the words which precede them which are an essential part of the oath—*The Lancaster and Carlisle Railway Company* v. *Heaton* (22). The oath of a non-believer as a witness can only be challenged before verdict, and if so challenged the evidence can be struck out by the Judge; but here the defendant had completed the oath and entered upon his functions as a member. The oath taken by a witness was only voidable, and until objection was taken to it remained a valid oath; here there was no person who could avoid it. The fifth count is bad inasmuch as it alleges that the defendant is a person upon whose conscience an oath, as an oath, has no binding force, because there is nothing in the Act which makes that an offence. The count is also uncertain and embarrassing, because it refers to an oath as an oath, and does not allege that the defendant is a person upon whom the oath as appointed by the statute as an oath has no binding force. *Miller* v. *Salomons* (12) shews there is a clear distinction between judicial oaths and oaths of office or quali-

(17) 2 Hatsell, p. 85*n*.
(18) Vol. ii. p. 76 *et seq.* (3rd ed.).
(19) Cited in Taylor-Innes on the Law of Creeds in Scotland, p. 158.
(20) 2 W. Black. 851.
(21) 3 East, 192, 201.
(22) 8 E. & B. 952; 27 Law J. Rep. Q.B. 195.

fication; the judgments of Parke, B., and Alderson, B., being an authority for the proposition that the law as to the oaths of witnesses is not necessarily the law as to oaths of office or qualification. There is a legal presumption that all natural-born subjects can, and when lawfully required shall, take the oath of allegiance; the defendant is such a person, and could not avoid taking it. Lastly, under 5 Rich. 2. st. 2. c. 4, a person was liable to fine and imprisonment if he did not take his seat and serve in the Parliament to which he was returned; see also cases collected in *Jacob's Law Dictionary*, tit. "Parliament."

BRETT, M.R.—In this case there have been two judgments of the Court below—the one being on the trial at bar, and the other upon an application to the Divisional Court. We allowed the defendant to move *ex parte* for a rule for a new trial, but we must deal with the judgment of the Court below as it was given on the trial at bar. The motion *ex parte* was therefore wrong, and in the future if there be a trial at bar the judgment if questioned can only be questioned in the Court of Appeal on motion, with notice to the other side. That, however, seems to me to be immaterial, for we can sweep away all forms, and we have to see whether the judgment can be impeached, and, if so, whether it can be impeached under such circumstances as will induce us to exercise the power we have of granting a new trial. A great many questions have been raised. It was said that the verdict was against the evidence, that the findings of the jury have been procured by evidence which ought not to have been admitted, and by misdirection, and that therefore they ought not to be allowed to stand. It was also urged on behalf of the Crown that there was no appeal, upon the ground that the matter was a criminal proceeding within the meaning of the Judicature Act. Then there was a question whether the judgment on part of the record ought to be arrested. All these questions can be best solved by coming to a conclusion as to the construction to be put upon the Act of 1866. The preamble shews the Legislature intended that an oath should be taken by members of both Houses of Parliament on taking their seats. Section 1 provides that the oath is to be made—not taken—and subscribed by members of both Houses of Parliament on taking their seats in either House in a form which is given. Then section 3 says that the oath appointed is in every Parliament to be solemnly and publicly made and subscribed by every member of the House of Commons at the table in the middle of the House, and whilst the full House is there duly sitting with their Speaker in his chair, at such hours and according to such regulations as the House by its standing orders may direct. Then section 5 provides that any member of the House who takes his seat or sits during any debate after the Speaker has been chosen without having made and subscribed the oath appointed, is to be subject to a penalty of 500*l.* recoverable by action in any of the superior Courts at Westminster, and in addition to the penalty his seat is to be vacated. Some stress has for certain purposes been laid upon the exact meaning of the words "the oath to be made," and whether the word "made" can be construed as if it were different from "taken." It seems to me, looking at the way in which it is used both in the preamble and in the Act, that it has precisely the same effect as if it were "taken." Then comes the question, whether the oath is to be taken more than once in the same Parliament—and this depends upon the meaning of the words "in every Parliament." The Act seems to me to mean that it is to be taken not in the next Parliament after the passing of the statute, but in that and every succeeding Parliament. If that is so, where and how often is a member to take the oath? The preamble says that an oath shall be taken by members on taking their seats, and section 1 says, "the oath to be made and subscribed by members on taking their seats": so that a member whenever he takes his seat is to take the oath. It is not enough, therefore, to say that when he has been elected a second time in the same Parliament he has already taken the oath. He must take it every time that, within the meaning of the phrase which is used in the Act, and which is to be construed according to the well-known practice of

Parliament, he takes his seat. The oath is therefore to be taken and to be subscribed. But section 3 says more than that, for it is in every Parliament to be "solemnly and publicly made and subscribed." Some meaning must be given to these words, and in my opinion the word "solemnly" does not merely mean religiously, but with all due solemnities, that is, with all the solemnities which are necessary to the taking of the oath with due solemnity in Parliament. Then the oath is to be taken publicly in Parliament; it is not to be taken in a corner of the House or at a time when nobody can see or know whether it has been taken or not. It is to be taken publicly in the face of the House, and with due solemnities. Then it is to be "subscribed," and that is a word which cannot be understood until the practice of Parliament as to subscribing is known. "Subscribe" means to write under something; and it is to be done at the table in the middle of the House, whilst a full House is there duly sitting with the Speaker in his chair, at such hours and according to such regulations as the House may by its standing orders direct. That obliges us to look at the standing order which has been vouched, to see what it directs. Under that order members may take and subscribe the oath required by law at any time during the sitting of the House and before the orders of the day and notices of motion have been entered upon or after they have been disposed of—so that a new condition is there introduced into section 3—but no debate or business is to be interrupted for that purpose. I take it that the word "interrupted" does not mean interrupted by the House—for they might stop the business if they thought fit; but it means so that no debate or business be interrupted by the person who is about to take the oath. All those conditions are therefore written into section 3. I thought for some time that the provisions of section 5, as to a member of the House voting as such in the House, or sitting during any debate after the Speaker has been chosen, without having made and subscribed the oath thereby appointed, might not include many of the things mentioned in section 3; but it seems to me that the oath thereby appointed is the oath which is to be taken according to the provisions of section 3, and therefore that, even although the person who took the oath in form or in fact was a person who could take an oath, and who did in fact intend to take it, yet if in so doing he did not do it with the due solemnities and publicly, or if he did it so as to interrupt the business of the House, although he took an oath he would not be taking the oath appointed by the Act, and would be liable to the penalties, if he afterwards either voted or sat. It has been further contended on both sides that section 3 imposes on every member a legal obligation to take and subscribe the oath, and that therefore if a person does not do so in the manner therein set forth an indictment will lie against him as for a misdemeanour under that section alone, and that the penalty in section 5 is cumulative. This point was argued by the Attorney-General to shew that the act done here was a criminal act, and that therefore no appeal would lie. It was also urged by the defendant that the same construction should be put upon the statute for the purpose of shewing the hardship that would arise from section 3 imposing upon him an obligation to take the oath, and from section 5, if construed in the way insisted upon by the Crown, making him subject to a penalty if he voted after he had thus taken the oath. But the Act must be read as a whole, and the two sections are not to be read independently of each other. Upon the true reading of the Act an obligation not known to the common law is imposed, and a consequence is enacted with regard to the non-performance of that obligation. Wherever a statute imposes a new obligation, the consequence following upon the non-fulfilment of the obligation imposed, even though not enacted in the same section, is the only consequence. The only consequence here of voting without having taken the oath in the manner appointed is that the person thereby becomes liable to a penalty. If that be so, no indictment can be brought, nor anything in the nature of a criminal proceeding done, under this statute. The recovery of a penalty, if that is the only consequence, does not make the matter a crime; if it did, the well-established distinction between a penal statute and a

criminal enactment would fall to the ground, for every penal statute would involve a crime and would be a criminal enactment. In construing the present statute I should, upon that alone, say that no crime is enacted by it. But there is more than that, for the penalty of 500*l.* is, in the phraseology used, to be recovered by action in one of the superior Courts at Westminster. It may be true to say, as is stated in *Comyns' Digest*, that in some cases "action" includes indictment or even criminal information. But the question here is, whether "action" in this statute does do so; and, construing the phraseology used according to its ordinary meaning, unless one can find something to shew it is to have the effect of a criminal indictment or information, it seems to me that it meant by action, and, further, by action in one of the superior Courts at Westminster. A criminal information was only instituted in the Court of Queen's Bench, and an information was also instituted by the Attorney-General in the Court of Exchequer for the purposes of recovering a debt or of rectifying a trespass, or of dealing with some injury to the Crown in its particular capacity and not merely as the representative of the public: so that that again would seem to shew that by the use of the words "by action in one of her Majesty's superior Courts at Westminster," this could not be the subject-matter of a criminal information or of a criminal indictment, and that the action could only be brought, as was decided by the House of Lords in *Bradlaugh* v. *Clarke* (6), by the authority and in the name of the Attorney-General, and therefore by an information which would formerly have been laid on the revenue side of the Court of Exchequer. The question then arises whether an information so laid is in any sense a criminal proceeding. The case of *The Attorney-General* v. *Radloff* (3), in the Court of Exchequer, is not binding upon any Court, because the learned Judges differed in opinion; nor in any case is it binding upon this Court, and we are therefore bound to form our opinion as to which of the two sets of Judges we can agree with.

Mr. Baron Martin and Mr. Baron Platt were of opinion that, unless there was something very peculiar in the Act which in terms enacted that it was to be a criminal matter, a proceeding on the revenue side of the Court of Exchequer for the recovery of a penalty in the name of the Attorney-General was not a criminal proceeding. Chief Baron Pollock and Mr. Baron Parke were of opinion that it was; but without going into the reasons there given, if I had at that time been a member of the Court I should not, unless the Act contained clear and special words to that effect, have considered that an action to recover a penalty on the revenue side of the Court of Exchequer could at any time be a criminal proceeding. If that be true, it is said to be met by the judgment of the House of Lords, and in particular by that of Lord FitzGerald, in *Bradlaugh* v. *Clarke* (6), which seems to shew that the proceeding under this Act, even though it be considered to be the same as one brought on the revenue side of the Court of Exchequer, is nevertheless a criminal matter. Now that question depends partly on the judgment and partly on the argument which has been raised upon the terms of the Act itself. The offence alleged is, not refusing or declining to take the oath, but voting or sitting without having taken and subscribed the oath. It is possible, although I do not think it probable, that a member might at the beginning of Parliament sit or vote who, from forgetfulness or ignorance, had not taken the oath, and who, although in every sense capable of taking an oath, would thus without any intention not have complied with the provisions of the Act. I have no doubt that if he did do so he would be liable to a penalty, for no question of intent is introduced into the Act. It is, to my mind, contrary to the established law of England, unless the legislation on the subject has clearly so enacted it, to say that a person can be guilty of a crime without a criminal intent. I am aware that in *The Queen* v. *Prince* (23) it was held by sixteen Judges to one that under section 55 of 24 & 25 Vict. c. 100, a person whom the jury found to have no intent, and also whom they found to have been deceived and to have understood the

(23) 44 Law J. Rep. M.C. 122; Law Rep. 2 C.C.R. 154.

facts to be such that he might perfectly well have done the particular act, was by the terms of that statute guilty of a crime and could be imprisoned. I bow to that decision, although I say still, as I said then, that I am unable to subscribe to the propriety of that decision; but the Court there applied the Act upon the ground that the enactment was absolutely clear. If it is not absolutely clear that this matter is to be considered as a crime, the doctrine comes in that it ought not to be so considered. But not long after the decision in *The Attorney-General* v. *Radloff* (3), the Legislature passed the Crown Suits Act, 1865 (28 & 29 Vict. c. 104), which, to my mind, seems to have decided the controversy among the Judges of the Court of Exchequer in favour of those who considered a suit or information for penalties on the revenue side of the Court of Exchequer was not a criminal proceeding, for by that statute all the rules applicable to a civil trial but not to a criminal trial were made applicable to such trials. The Act is not in a declaratory form, but nevertheless all the conditions of a civil trial, including, amongst others, the power of granting a new trial, were made applicable to these proceedings. Under the old practice, the Court of Exchequer sitting *in banc* could have granted a new trial for misdirection or otherwise. No such thing is known in a criminal case, and therefore the Act most strongly shews that this proceeding was to be treated as a civil action, with all its consequences, including, where it does exist, the right of appeal. Formerly no appeal would lie from a refusal to grant a new trial, but there were other matters in respect of which an appeal was given. It was said that this offence was held to be a crime in *Bradlaugh* v. *Clarke* (6); but the judgments in the House of Lords are, to my mind, far from shewing that it was a crime. The Lord Chancellor, in a most subtle and careful manner, dissected the various Acts of Parliament to shew that in this case the Attorney-General alone, and not a private individual, must sue. Now, if either the Lord Chancellor or Lord Blackburn, who was of opinion that a private person could sue, had thought that this was a criminal proceeding, they would not have given any of the reasons which they did, but would at once have said the proceedings could only be taken by the Crown. Then it is said that a private individual can sue for libel or for an assault, although the Crown can also indict for the same matters; but in those actions the cause of action is not the libel or the assault, but the injury done by them to the private individual. He does not sue on behalf of the public, or because the public are injured by a libel, or because there was danger of producing a breach of the peace, but in respect of the injury done to him by the libel or assault. The Crown could not maintain a suit in respect of such a cause of action. Now, coming to the phrase used by Lord FitzGerald in *Bradlaugh* v. *Clarke* (6), that the statute "creates a new public misdemeanour, imposing a penalty as a punishment, and does not in any manner express an intention that such penalty shall go to, or be recovered by, any one who shall sue for it," I do not think the learned Lord could have used the words at the end of that sentence if he had thought that this was a crime. But even if this had been his opinion, the whole of the judgments in the House of Lords shew that they were all of opinion that it was an action for penalties, which was equivalent to a civil information on the revenue side of the Court of Exchequer, and which could only be brought by the Attorney-General and not by a common informer. It must be admitted that although upon the words of this Act the Attorney-General has a prerogative right to bring the matter before the Court by way of information, he might equally well have brought an action of debt to recover the penalties on behalf of the Crown. I agree with the remarks of Mr. Baron Martin in *The Attorney-General* v. *Radloff* (3), that if the Attorney-General could have brought either an information in the Court of Exchequer or an action of debt, it would be inconsistent with the whole view of the criminal law to say that if he proceeds in the one form rather than in the other, he can, under the same circumstances, make that a crime in the one case which can only be treated as a debt in the other. I am, therefore, clearly of opinion that the proceeding under the Act of

1866, although it can only be taken by the Attorney-General and not by a private individual, is in the nature of a civil and not a criminal proceeding. Even if it could for some purposes be considered as a criminal proceeding, it does not seem to me to be that kind of criminal proceeding in respect of which the Judicature Act has taken away the jurisdiction of the Court of Appeal to hear an appeal. That Act deals with procedure alone; it recognised actions and suits in the Court of Chancery, and many well-known civil proceedings. It recognised criminal proceedings by bill of indictment, criminal informations by the Queen's coroner or by the Attorney-General, and also criminal proceedings before magistrates; and it intended that those which were clearly criminal proceedings, and had always been recognised as such, should not be brought before the Court of Appeal, but that all others should.

Two cases, of *Mellor* v. *Denham* (4) and *Ex parte Whitchurch* (5), were cited, in which it was said that proceedings to recover penalties were treated as criminal proceedings. In the first of those cases, Lord Bramwell, who really gave the decision, did not so much enter into the reasons why he thought there was no appeal, but he seemed to be much touched by the fact that the matter was of the slightest importance, and that, if possible, the Court ought not to encourage an appeal. In *Ex parte Whitchurch* (5) his Lordship said that at the time when he gave judgment in *Mellor* v. *Denham* (4) he was in doubt—and perhaps this is why he did not give the reasons for his judgment. The reasons for the judgment in *Ex parte Whitchurch* (5), to which I was a party, were given in express terms, and I know the case was debated amongst the Judges. There the proceedings were for a penalty which might be recovered before magistrates under Jervis's Act, by which, therefore, they were controlled. That Act did not give any new jurisdiction to magistrates, but merely regulated proceedings before them in cases which were already within their jurisdiction. The magistrates were not Judges in civil cases as a rule, although it is possible that in some cases they might have to decide a civil dispute. Most of the orders made for the payment of money were made by the magistrates in respect of matters which were considered to be within their jurisdiction as police matters. Therefore, whether it was an order for payment of money, if it was a police matter, or whether it was an order for the payment of a penalty, with the alternative that the party making default was to be imprisoned, the matter was, in point of fact, *quasi*-criminal, and was treated as a criminal matter within the jurisdiction of the magistrates. That was the ground given in *Ex parte Whitchurch* (5) as the reason why the matter, although it was for a penalty, was to be treated as a criminal matter in which there was no appeal. These cases do not, therefore, govern the present one; and therefore I am of opinion that the right of appeal is not taken away by the Judicature Act, but, on the contrary, if necessary, is given by that Act. The judgment of the Court at bar is not a judgment in a criminal proceeding, and therefore an appeal lies from it under the Judicature Act. If an appeal lies, then the judgment may be impeached by shewing that it was not obtained in a legal way. It was said that because the trial was at bar there could be no appeal on the ground of the verdict having been obtained by misdirection or by the wrong reception of evidence. It is stated in some of the books that the Court would not listen to a motion for a new trial after there had been a trial at bar on the ground of misdirection or that evidence had been wrongly received or rejected. But it is also established that the Court, when sitting *in banc* after the trial at bar had ceased, would set aside a verdict and grant a new trial on the ground of misdirection, and I also apprehend that if the record were bad on the face of it, a motion might be made in arrest of judgment. I am also aware that it is stated that the Court would not hear an appeal; but I doubt whether that question was ever brought to a judicial test. It may be that the Court *in banc*, having already decided the point at bar, would not entertain it, for they would be unwilling to rehear and overrule their own decision; but I doubt whether, if the right had been insisted upon, they would have declined to

hear the matter. I merely say this by way of protest, for I do not myself understand the doctrine that Judges, because they have once decided a question, would therefore decline to listen to an argument to shew that they themselves were wrong. It never was suggested that a Judge who had tried a case could not sit *in banc* to hear a motion for a new trial upon the ground that he had misdirected the jury. On the contrary, the Judges often gave unanimous decisions that there had been misdirection or non-reception of evidence, the Judge who had misdirected or who had wrongly received or rejected evidence also sitting as a member of the Court. However that may be, a trial at bar is now a trial by some of the Judges of the Queen's Bench Division. The only difference between a trial at bar and a trial before a single Judge was that in the former case the whole Court sat—there were four Judges who assisted each other; but in neither case were the incidents of a trial different. The Judges who tried the case here are part of the High Court, and an order made by them directing judgment to be entered on the verdict, or a verdict to be entered, is an order of some of the Judges of the High Court, from which, whether it is made at the trial at bar or by the Divisional Court or elsewhere, the Judicature Act gives an appeal to the Court of Appeal, unless the matter be a criminal matter. I therefore think that the present appeal was well brought.

The main question in this action is, whether it can be proved that although the defendant took the oath in form, supposing that he complied in every other respect with the provisions of the Parliamentary Oaths Act, 1866, he can be said to have taken the oath within the meaning of this Act, and must be liable to a penalty if he is a person whose mind is in that state in which we think his mind is. When that Act was passed the decisions at law were well known, and that of *Omichund* v. *Barker* (15) had become a matter of history. We have therefore to consider under these circumstances the true meaning of the Act which says that an oath must be taken. Upon this part of the case the jury have unanimously found that they were satisfied that on the 11th of February, 1884, the defendant had no belief in a Supreme Being. This finding alone would have raised the point; but the jury further found that they were satisfied that on the day in question the defendant was a person upon whose conscience an oath, as an oath, would have no binding force. It seems to me that the second finding might properly be predicated of a person of whom the first could not be found, but that it would be an unnecessary finding if the first question could be properly found, for it is impossible that a person who has no belief in a Supreme Being can do anything which can be binding on his conscience as an oath. Can a person in that condition according to law and to the intention of this Act take an oath? Can whatever he does in form, or can it not, be said to be an oath? The law with regard to that has been established and adopted by every Judge who had to speak of it, according to the judgment of Chief Justice Willes in *Omichund* v. *Barker* (15). The judgment is in this form: "I am of opinion that such infidels as believe in a God, and that He will punish them if they swear falsely, in some cases and under some circumstances, may and ought to be admitted as witnesses in this, though a Christian, country"—observe the care with which he puts it—"And on the other hand, I am clearly of opinion that such infidels, if any such there be, who either do not believe in a God"—that is the first of these findings—"or if they do, do not think"—this is the alternative, although they do—"that He will either reward or punish them in this world or in the next, cannot be witnesses in any case, nor under any circumstances, for this plain reason, because an oath cannot possibly be any tie or obligation upon them." There is therefore no necessity that the person should believe that he will be punished in a future state. It is enough if there is any religion in which it is supposed that a Supreme Being would punish a person in this world for doing wrong; but if he does not believe in a God at all, or if believing in a God he does not think that he will be either rewarded or punished in this world or the next, he cannot, according to the law of England as here declared, be a witness "in any case nor under any cir-

cumstances." It is true these words were used, but they were used because the subject-matter of the enquiry was with regard to a witness. But the same principle must apply, if there be anything in the reasons given, to the case of an oath whether the person is a witness or not. It was a logical accident that the person was a witness, but the question before the Court was whether, although he went through the form of taking an oath, he could take it. The defendant here has relied more than once upon his statement that the oath is binding upon his conscience. But in *Phillips on Evidence* (24), although I am unable to verify the reference, which seems to me to be wrong, it is laid down that "it is not sufficient that a witness believes himself bound to speak the truth from a regard to character, or to the common interests of society, or from a fear of the punishment which the law inflicts upon persons guilty of perjury"—and I would add to that, "or from what he considers as in honour binding upon himself." That is not sufficient. The question is not whether he is bound in honour, but whether he is bound by an oath. The decision of Chief Justice Willes, which has been adopted and recognised in many cases since—and in particular in *Miller* v. *Salomons* (12), where the doctrine was recognised as a right doctrine and acted upon—shews that the question is, whether a person who is in the state of mind such as is there described can in either of the cases take an oath at all. It seems to me to be clear that the defendant has not taken an oath. He may have taken something which is binding upon him according to his feelings; but that is not what the Act requires—namely, that he shall take an oath. If that be so, it puts an end to the case, and it is immaterial whether he has fulfilled the other provisions of the Act. I do not, however, desire to let this case go without giving a full opinion upon every point which has been raised.

I will first deal with the question what should be the evidence as to a person being in such a state of mind as that in which the defendant is, and the time within which it should be given. It was urged that the answer of a person who is charged under this Act, and who says that the oath is binding upon his conscience, must be taken; but, as I have shewn, that is not enough of itself. If, however, he said that he believed in a Supreme Being, and if he believed that a Supreme Being would punish or reward him either in this world or the next according to whether he did right or wrong, then his answer must be taken. Having come to the conclusion that the state of his mind is part of the issue of fact which is to determine the question whether or not he can take an oath, a difficulty arises whether the Court is to be bound by what he says. It is argued that it is, because it is said that a Judge is bound by the answer given by a witness who is examined at a trial upon the *voir dire*. Even if that be so, and I doubt it, the question here is as to the state of things under the Parliamentary Oaths Act, 1866, and on a trial of an issue under that Act. When an issue of fact is raised in order to determine a point of law, it seems to me that it must be decided by a jury upon the same rules and by the same class of evidence as any issue of fact in any other case. The parties therefore who assert that the defendant was in a state of mind which rendered him incapable of taking an oath, and who shew that whatever he did he could not and did not take an oath, have a right to prove that matter by any evidence which does not break any rule of law which would go to prove the affirmative or negative of that proposition. Witnesses might be called to shew that the defendant, although he himself denies it, did in their presence, and within such a time as would justify reasonable men in acting upon such evidence, make admissions or do such acts as shew that he could not have believed in a Supreme Being. The only limitation with regard to the time as to which that evidence is admissible is the usual limitation that it must not be beyond such time as would prevent reasonable men from acting upon it. If it is beyond such a time, the Judge has to direct the jury that it is not evidence at all, and he therefore would not admit it.

The next question is, whether an asse-

(24) At p. 16 (10th ed.) citing *Ruston's Case*, 1 L. C.C. 408.

veration by the defendant in this action that he did believe in a Supreme Being would be conclusive. It is strange that although the defendant, before the enabling Act allowed him to affirm, would, upon the trial of this issue, have been examined upon his *voir dire* to see whether he could be sworn or not, and although he can now be examined as a witness, yet in order to test the question whether he does or does not believe in a Supreme Being he has to satisfy the Judge that he does not. I admit the strangeness of the proceeding, but I say that even if when in the witness-box the defendant were to pledge himself that he did believe in a Supreme Being, yet the jury must determine the question upon the conflict of evidence so raised, just as they would have to determine other questions of fact raised in a similar way. That is my view of the Act, and of the trial which has to take place under it.

It was then said that this question could not be enquired into unless the persons before whom the defendant had to take the oath could and did have full knowledge and cognisance of his state of mind. I cannot see any such condition stated in this Act, and I must therefore declare my view, that if a person were to sit and vote in the House of Commons after having gone through the formalities and without having described his state of mind to the House, and although the House had no cognisance of his state of mind, yet if it afterwards came to the knowledge of the Attorney-General, upon proof which he thought right to act upon, that such person had sat or voted in Parliament, although he had gone through all the forms, but being found by a jury to be in this state of mind, I think he would be liable to the penalties, and that the fact whether Parliament knew he was in this state of mind or not would be immaterial. No doubt this shews the severity of the Act.

It was then suggested that the only evidence admissible in such cases is the conduct of the defendant either in or before the House; but there again I see nothing in the Act to confine the evidence to anything of this kind in an action brought under the Act. Even if the defendant had never said anything in Parliament, yet if what he had said or done out of Parliament before he was elected was brought forward in Court by legitimate evidence, and was such as would entitle the jury to find that when he sat and voted, although he had gone through the forms, he had this state of mind, I am of opinion that the penalty would accrue, because he would not and could not have taken the oath.

Now, with regard to the other questions, which are not necessary for the purpose of deciding this case, but about which I think it better to express an opinion—supposing a person was one who, not being in the frame of mind in which the defendant is, can take an oath, and supposing that he could and did take an oath in such a manner as to disregard the due solemnities as to taking an oath which are appointed by this Act, but without subscribing the oath within the meaning of the Act; or supposing that he took the oath with some or all of the solemnities required, yet in defiance of Parliament did it so as to interrupt business—then, in any one of these cases, I am of opinion he would not take the oath appointed by the Act, and must be liable to a penalty. That raises many of the questions discussed here with regard to the reception of evidence. I must, however, guard myself here. Supposing there had been misreception of evidence here or a misdirection, yet if that misdirection or misreception only went to these points, and would not affect the judgment of the jury upon the question whether the defendant could or could not, and whether he did or did not take an oath, we could not here grant a new trial, because the one finding of the jury would determine the matter. Even supposing that that were not so, would the evidence be properly admissible in the case of a person who could take an oath? Having regard to what has been done in the House of Commons, a construction must be put upon the word "solemnly." I think, upon the face of the Act itself, that it does not mean "religiously," but with due solemnities. Thereupon arises the question as to the meaning of the expression "due solemnities" in and before the House of Commons, and this can only be decided by

hearing what those "due solemnities" are. Now, "the due solemnities" are that a person shall go up through the House to the table, and there do certain acts at a time when it is not out of order to do them. I do not know whether it was proved that he ought not to do that until he is called forward by the Speaker, but if that is one of "the due solemnities" it must be gone through, and he cannot defy it. A thing cannot be done with "the due solemnities" of the House which by the rules of the House is disorderly and not solemn. If, therefore, he was breaking the orders of the House, I should say he could not be doing the thing with "the due solemnities." That raises the question as to the effect of the Speaker calling "Order, order," to a person in such a position. I think it is that he is not to proceed; and I care not whether he is to sit down or not. It was urged by the defendant that he could not sit down because, if he did, his seat would under those circumstances have thereby become vacated. I wholly doubt that. The seat, as it seems to me, can only become vacated if a person within the meaning of the Act sits, or sits and votes, during a debate. But that could not be so when a person sits down under the circumstances suggested according to the order of the Speaker, if the order was to that effect. The meaning of that order was that he was not to proceed, whether he was standing up or sitting down; and whether he ought to have stood at the table, or whether he ought immediately to have retired behind the bar, seems to me to be immaterial. The evidence proves that he committed a breach of the order and defied the House, because the Speaker, in calling "Order, order," is carrying out the authority of the House, and is calling upon him to desist from doing that which is out of order. Not only was that the real intention of the Speaker, but I have not the slightest doubt that the defendant knew that just as well as the Speaker. That of itself would prevent the defendant from having taken the oath appointed. The next question is, whether he did not break the standing orders. The defendant did not interrupt debate, because none was going on; but did he interrupt the business of the House? Now, what is considered to be the business of the House cannot be known without knowing the practice of the House on that matter. It was proved in evidence that the rule of the House is that when the Speaker stands up and calls "Order, order," no other business is to proceed. The Speaker is then in possession of the House to inform the House of some matter. There might be a message from the Crown, or some resolution of a committee of the House of which he had to inform the House. If he was standing up for that purpose, it is obvious that he did so in order to do the business of the House; and he was doing so by the authority of the House, so that the House as a body were doing that business. It is the House who are then insisting upon order being preserved. That is the meaning of the evidence given by Sir Erskine May; and if the Speaker stood up, acting on behalf of the House, for the purposes which I have mentioned, and was calling the defendant to order, the business of the House was interrupted, and the defendant did not "take the oath as hereby appointed." Then the defendant himself "subscribed" the oath; but that word is a general word which is to be applied to what is done in the House. The oath is not to be subscribed under this Act "anywhere," but only in Parliament. It was proved, not merely by the production of the Journals of the House, but by the evidence of Sir Erskine May, that the mode of subscription is for a roll, which has for years been known as a "test roll," to be subscribed. I do not undertake to say what is the meaning of the word "test," but the roll is subscribed by every member of Parliament, and is produced and kept by the officers of the House. That is the meaning to be given to the word "subscribe" in this Act. It is not a sufficient subscribing of the oath within the meaning of the Act for a person to take up a piece of paper with the oath written on it and to write his name upon it under the oath. The oath must be subscribed according to the well-known practice of Parliament. Even supposing the defendant was a person who could, and who did, take the oath, yet he would not have taken the oath "hereby appointed," for that includes subscribing, and he would not have subscribed it.

Then comes the question whether the oath has or has not to be administered. There are no words in the Act to the effect that the oath is to be administered. In my opinion it is not; and I am not aware that the House can administer it. The Speaker is the first person who takes it, and it certainly is not administered to him. It is to be taken in the presence of the House publicly and with "the due solemnities." It was argued by the defendant that even if the Speaker had stood up, and in the most imperative terms ordered him to withdraw, or had said that he was out of order in proceeding, yet because the oath was not administered to him he would have a right to defy the House and to take the oath. But that would not be a taking of the oath with "the due solemnities" according to the Act; it would certainly be a breach of the rules.

The last matter which the defendant relied upon—that the Speaker had accidentally sat down for a moment—is one which I cannot condescend to go into. The real substance of what the Speaker was doing must be looked at to see whether he was sitting down so as to allow the defendant to do that which he can only do when the Speaker as such is sitting in his chair. It therefore seems to me that there is no ground for setting aside the judgment of the Court below, and certainly none for granting a new trial. I have endeavoured to shew that it is impossible for any person by any artifice to absolve himself from doing any of the things which are enunciated in this Act as necessary to be done in order to avoid being subject to a penalty. The moment the matter comes to trial before a Court which has to deal with this Act, the person becomes subject to the penalty, whatever the House of Commons may have done. If the House were not to refuse to allow him to sit, or even if a resolution were passed allowing him to sit, no Court when administering either the statute or common law would be bound by anything which Parliament within itself had done. The Courts must act upon the law, whatever the House may or may not have done; and unless the person has substantially fulfilled within the meaning of the Act every one of the conditions imposed, he must be liable to the penalty. I therefore think the judgment was right, and must be affirmed.

COTTON, L.J. — The first preliminary objection taken was that this information was a criminal cause or matter, and that an appeal could not therefore be entertained under section 47 of the Judicature Act, 1873. I think that the question admits of some doubt. The question is not whether the act in respect of which the information is brought is a criminal act, but whether the proceeding is a criminal cause—not a matter, for that term only refers to some proceeding before the Court not in an action or in a cause. There is a great deal in the argument urged by the defendant, that prior to the passing of the Judicature Act there was, under the Crown Suits Act, by reference to the Common Law Procedure Acts, an appeal in such a case; and it would be a strong thing to say that the appeal has been taken away by section 47 of the Judicature Act, 1873. I wish to express no further opinion upon it, except to say that, although I do not differ from the opinions expressed by my learned brethren, I have considerable doubt upon the question, and if our view of the appeal upon its merits had been other than it is, I should have desired further time to consider whether the objection was a good one or not. The second objection which was taken was that where there is a trial at bar an order for a new trial cannot, according to the practice of the Court, be made in the Court below, and that therefore there can be no appeal. Section 19 of the Judicature Act, 1873, clearly gives a right of appeal to the Court of Appeal from every judgment or order of the Queen's Bench Division; and not only on the motion in arrest of judgment, but also when there is an appeal from the judgment, the Court can, under Order LVIII. rule 5, on the hearing, order a new trial either for misdirection or for misreception or rejection of evidence. The Attorney-General having waived all technical objections, all the matters which have been urged by the defendant on the appeal can properly be disposed of.

The Lord Chief Justice laid down, in accordance with what I consider to be the law, what was necessary to constitute an

oath, and the fifth count of the information in terms states that the defendant was a person who had no belief in a Supreme Being, and was a person upon whose conscience an oath, as an oath, has no binding effect. If that is proved, it is shewn that the defendant has not complied with the provisions of the Act; there would then be no misdirection and the count would be good. Section 5 of the Act of 1866, which I take alone for the present purpose, clearly says that a member of the House is liable to the penalty here sued for if he sits and votes without having made and subscribed the appointed oath. The expression "making the oath" must mean taking that which is recognised by law as an oath. The Legislature undoubtedly was referring to the well-established law of England, which is that a person who does not believe in a Supreme Being, or who does not believe in a Supreme Being who will punish him either in this or in a future world for the offence of telling an untruth, is a person who does not take that which is recognised as a valid oath. Lord Coke had laid down that none but a Christian could take an oath. That question was discussed in *Omichund* v. *Barker* (15), where the person who had taken the oath was a Hindoo who professed the Gentoo religion and believed in a Supreme Being, but who was not a Christian. The essence of taking an oath according to the law of England was there considered, and laid down in the terms which have been read by the Master of the Rolls. Those observations are important when one considers the occasion upon which the question arose. In *Miller* v. *Salomons* (12) Baron Martin, after referring to that case as correctly laying down the law as regards what was necessary for the taking of an oath, says that "the doctrine laid down by the Lord Chancellor and all the other Judges was, that the essence of an oath was an appeal to a Supreme Being in whose existence the person taking the oath believed, and whom he also believed to be a rewarder of truth and an avenger of falsehood, and that the form of taking an oath was a mere outward act and not essential to the oath." I read that passage because it shews how, down to the latest time, that has been recognised as correctly stating the law of England as regards taking an oath. That being so, it was said that there were various reasons why, in construing the Act of 1866, we should not consider that the oath required to be taken here was an oath according to the definition of an oath laid down in *Omichund* v. *Barker* (15). The answer given was that the law as there laid down is in no way limited to such witnesses: the essence of an oath is there laid down, and if any person is required by statute to make an oath, he must make such an oath as would be a valid and effectual oath in order that it should have the essence of an oath according to law. It was then urged that the statute, inasmuch as it requires members of Parliament to take the oath, qualifies them to do so whatever may be their belief or disbelief. In my opinion that argument is not well founded. The statute really provides that every member of Parliament who acts as such in the way described in section 5 without having taken the oath shall be liable to a penalty. It therefore does not require every one necessarily to take the oath, but provides that if he does certain acts as a member of Parliament without having taken the oath required, he shall be liable to a penalty. A person who is incapable of taking an oath is not therefore qualified by the statute to take it, and cannot act as a member of Parliament without incurring the penalty. The defendant referred, amongst other matters, to the oath of allegiance, and said that every subject, with certain exceptions, can take that oath. But that argument is answered in a word by Baron Martin in *Miller* v. *Salomons* (25): "The only oath imposed by the common law upon the subjects of this realm is the oath of allegiance, which originated in the old feudal oath of fealty, and this oath all persons capable of taking an oath at all can lawfully take."

The defendant has referred to several statutes, and the first upon which he relied was 1 & 2 Vict. c. 105; but that statute assumes that an oath is taken according to law, and that the person who takes it has declared that the oath is

(25) 7 Exch. Rep. at p. 523.

binding upon him; it was intended to prevent any difficulty which might arise in cases where, although the person who took the oath was capable of taking an oath, the form might be said to be one which could not properly be administered to him. That statute, therefore, deals merely with the form and not with the substance of an oath. The next statute upon which the defendant relied was 30 & 31 Vict. c. 75, the preamble to which recites that "certain of her Majesty's subjects are now, on the ground of their religious belief, subject to civil disabilities, and are required to take oaths for the enjoyment of offices and franchises which other subjects of her Majesty are not required to take." Section 5 gives a form of oath, and section 1 says it is to be taken "instead of the oaths of allegiance, abjuration, and supremacy, and also any other oath or declaration of office not involving any religious test which now is, or from time to time may be, required to be taken." That enactment did not alter the character of an oath. It was argued that that statute says it is to be no test of religious belief, and therefore that a person who has no religious belief at all can do that which the law of England says he cannot do, namely, effectually take what the law will recognise as an oath. The object of the statute was to prevent certain objections being taken to believers who did not belong to the Established Church, or who did not come within certain definitions, and also to prevent any objection being taken to a Roman Catholic, who in consequence of his form of religious belief would be prevented from taking certain oaths. But the statute did not alter what has been established by the law of England to be essential and necessary to make an oath valid. In my opinion. therefore, the direction of the Lord Chief Justice on the fifth count was right. That count does not shew that the defendant is punishable because he is a person of no religious belief, but because what he did when he said the words and wrote down the words of the oath was not in compliance with the provisions of the Act of 1866. He became liable to the penalties imposed by that Act because he was not capable, on the statement contained in the fifth count, and on the direction of the Lord Chief Justice, of doing that which he purported and attempted in form to do, namely, to take the oath. If that be so, the penalties follow. Undoubtedly if he were right in his contention that, notwithstanding that he had no religious belief, yet he could effectually take the oath under the statute, and would not therefore be liable to the penalties, then the evidence given as to his religious belief was wrong; but if the fifth count does state the ground for saying he had incurred a penalty, then the evidence on the whole was right.

The defendant further contended that evidence was inadmissible to shew either what he did in May, 1880, when he came to the House of Commons to affirm under an Act to which I must refer, or what he said before the committee of the House of Commons, upon the ground that no enquiry could be made as to what was done before he was elected a member of the Parliament in which he sat and voted. If that contention be true the evidence was wrongly admitted. But the question of fact to be enquired into was whether, at the time when he went through the form of taking the oath, he did or did not effectually take an oath according to law; any evidence from which a reasonable conclusion could be drawn that he did not at the time entertain that belief which would enable him to take an effectual oath would be admissible. If the evidence had been to shew what he had said some twenty or thirty years ago, it might be said a jury could not reasonably infer from that what his state of mind was in 1884. It was also objected by the defendant that, as he had stated in an answer to the committee that he considered this oath would be binding upon him, the Court must take it that it would be so binding, and could not enquire further into the matter. But that, in my opinion, is wrong; and the question is one of fact whether he could or could not, and whether he did or did not in fact, take an oath. All the evidence and statements of the defendant must be looked at. Now, although the defendant did make the statement to the committee upon which he relies, he also made other statements which shew that he only thought the oath

would be binding upon him because he would not make a promise which he did not intend to keep, and it was a promise with a statutory obligation; also that he did not look upon what he did as a promise which involved the calling a Supreme Being to witness, and that he did not believe that that Supreme Being would punish him if what he said was false. If a person says that he is willing to take an oath, and that he considers it would be binding upon him, he may be admitted as a witness; but where the question is whether or not he can take an oath, not one answer only, but the other answers, as well as all the other facts of the case, must be looked at. That being so, the main part of the case is disposed of; but as it has been so fully discussed, I think it would be wrong not to add a few observations on the other points which were raised.

It was argued that section 5 of the Act of 1866 must be read by itself; that it only requires the oath to be made and subscribed; and that it does not in any way import those conditions which are imposed by section 3. That question becomes immaterial in the view which I take as to the misdirection and as to the fifth count, and which would justify the verdict and judgment. Under those circumstances it would be wrong, even if evidence which was not material to the real question had been admitted, to grant a new trial. Now, what would be the effect of reading section 5, which imposes the penalty, independently of section 3, which directs the manner in which the oath is to be taken? It might be that a person who could take and did take the oath might take and subscribe it in his own house. If the only requisition in that section were that the appointed oath shall have been taken and subscribed it would lead to a great inconvenience and absurdity if that section only were to be looked at, because the oath might be taken at any time and subscribed in any way or place a person thought fit. Of necessity, therefore, it must be taken and subscribed before the House, so that the House could take notice of it; and section 5 must not be read by itself, but section 3 must be referred to in order to see what that section requires. It was argued that section 3, even if read with section 5, only introduces the resolutions and standing orders of the House. That is so; but the Attorney-General relied on the practice of Parliament, not in order to throw upon the defendant any obligations other than those which section 3 imposes, but in order to understand the meaning of the standing order and the provisions of the section. It is clear that, in order to see whether the provision as to subscribing the oath has been complied with, the practice of Parliament may be gone into. When it is the practice as to subscribing, adopted and acted upon by the House, that a test-roll is to be signed after the oath has been taken, then evidence as to that ought to be given and regarded. The object of the provision which requires the oath to be solemnly and publicly made is to prevent it being made in a secret and surreptitious manner, and to ensure that it is taken with publicity and solemnity, in accordance with the practice which the House has approved of, both in the making and in the subscribing of the oath.

There is one other point which deserves to be mentioned. It was said that there is a limit to the time when the evidence of a witness can be objected to upon the ground that he has not properly taken the oath. But the Act of 1866 deals with a different matter, and subjects a person who does certain acts to a penalty. In any action, therefore, which is properly brought against him, an enquiry must be made whether in fact he has or has not subjected himself, by the acts which he has done, to that penalty. But the primary object of an action between parties is to settle their rights in that action; it is therefore proper that there should be some limit to the time within which either party can object to the verdict and judgment in order to prevent it being said after a great length of time that the oath had not been properly taken. There is no analogy between the time when the objection can be taken in the one case, and between the time and manner in which it can be taken in the other. As regards the essence of an oath, the law as laid down when the question arose in the case of a witness is, in my opinion, applicable equally to the question arising under the Parliamentary Oaths

Act. The defendant, although he repeated the words of the oath and signed a paper with those words written upon it, has not done what the Act requires, and, under these circumstances, is liable to the penalties for which he is sued.

LINDLEY, L.J.—The first question to be considered is whether there is any appeal from the decision of the Court below, it having been said that there is none because the trial was at bar. That point, however, seems to me to be untenable when section 19 of the Judicature Act, 1873, is looked at. An appeal is there given from any judgment or order of the High Court, unless it falls within some of the four sections to which I shall presently refer on the second objection; but there is nothing whatever to cut down the general language of that section so as to confine it to a trial before a single Judge. It is plain from the language of the section that an appeal lies from a trial at bar; and the appeal would be regulated in this Court by Order LVIII., by which power is given to the Court of Appeal to grant a new trial in a proper case. It appears to me that by an oversight the matter was allowed to come by motion *ex parte* instead of by notice of motion by way of appeal, which would be the proper form of an appeal from a trial at bar. But that has been put right, and is a mere matter of form. It was argued that there was no appeal, because this was a criminal cause or matter within the true construction of section 47 of the Judicature Act, 1873. The argument of the Attorney-General up to a certain point had considerable weight; we are not considering the abstract question whether this is a criminal or a civil matter, but whether there is an appeal. It is well known that there are certain matters on the boundary line, and this is one of them; but the difficulty is removed by the provisions of the Crown Suits Act. It appears to me, upon looking through the Judicature Act and the various sections relating to this matter, that there is not the slightest indication of any intention on the part of the Legislature to deprive suitors of an appeal in cases which were previously made civil proceedings for the purposes of appeals. Such cases, at all events, do not fall within the language of section 47. Except for the provisions of the Crown Suits Act, and, in particular, sections 31, 34, and 35, I should have had more doubt, but having regard to these sections it appears to me that an appeal does lie.

With regard to the arguments on the first and fourth counts of the information, and assuming that the defendant was a person who had a belief in a Supreme Being, and could therefore take the oath prescribed by the Parliamentary Oaths Act, I will investigate the question whether he took the oath in the manner required by that Act and by the standing order. The jury have found as a fact that he did not do so, and I think that that finding was right. It is impossible to understand either section 3 of the Act of 1866 or the standing order without referring to the practice of the House. One does not know what is meant by the expression "the sitting of the House," for the standing order does not explain it, or by the expressions "the order of the day," a "full House," "the Speaker in the chair," and above all what is meant by "solemnly and publicly," with reference to the making and subscribing of an oath in the House of Commons, or by "interrupting the business of the House." It is essential that evidence as to the meaning of those expressions should be given in order to explain and give effect to the Act and the standing order. I therefore think that that evidence was admissible. That being so, I will not discuss in detail the various points in order to shew why I think the jury were justified in the conclusion at which they arrived. One point is, however, clearly established—namely, that the oath was not subscribed in the manner required by law—and that alone would be sufficient to uphold the verdict.

But that was not the only point on which the defendant failed to comply with the Act. I also think that he did not solemnly and publicly make and subscribe the oath as required by the Act and the standing order. Therefore, assuming that the defendant had that belief in a Supreme Being which I have assumed, I think that in conducting himself as he did he incurred the penalties which have been recovered by the verdict.

The next question, as to the ability of the defendant to take the oath, arises on the counts of the information which I have considered, but more particularly on the fifth count. The question is a most important constitutional one, and is simply whether a person who has no belief in a Supreme Being can sit and vote in Parliament, and whether if he does so he is liable to the penalties. I concur in the observations which have been made as to the construction of the statute. I think it is impossible to read section 5 without reference to section 3. I shall not state at length my reasons for holding as a matter of law that an oath implies a belief in a Supreme Being. The case of *Omichund* v. *Barker* (15), the discussion in *Miller* v. *Salomons* (12), and coupled with these decisions the fact that there are a series of Acts, some relating to oaths, and some to solemn declarations, render that question unarguable. An oath does not import, and is not in point of law synonymous with, a solemn declaration, and still less with an empty form of words.

The fifth count covers the question that the defendant had no belief in a Supreme Being when he purported to take the oath. There was ample evidence of that fact to go to the jury, and for the reasons given I think the verdict was right. The defendant could not and did not take the oath because he could not comply with the Act, and he therefore became liable to the penalties. Upon that view of the case, it becomes unnecessary to discuss another point raised by the defendant—the fact that the House prevented him making and subscribing the oath otherwise than he did; and upon that point I see no reason to differ from the judgment of the Court below. It was further contended by the defendant that it was absurd to hold that a man is by law incapable of doing that which the law requires him to do, and that as the defendant was required by the Act to take the oath, the ability to take it must be ascribed to him and cannot be enquired into. I agree in the absurdity, but not in the argument deduced from it. If the Act required every person who is elected to serve in Parliament to take the oath and serve, and he were to be prosecuted or were to be sued for penalties for failing to take the oath and serve, the absurdity would arise; but a man would be absolved, not by ascribing to him an ability to take the oath which he did not possess, but by holding that he could not be properly elected, and that the Act did not therefore apply to him. The Court in *Miller* v. *Salomons* (12) dealt in that way with a similar argument and a similar alleged absurdity which was pressed upon them; it is also the way in which similar arguments have been dealt with before, for there are cases under the Corporations Test Act of Charles 2 in which the same difficulty was urged. That difficulty does not really arise here. The same observations apply to the argument as regards the oath of allegiance; but it is to be further observed that it is no longer true that every natural-born subject, with one or two exceptions, can be required to take the oath of allegiance. The difficulty, which was merely a technical and logical one, cannot arise now in that shape, for the law has in that respect been altered by section 9 of the Promissory Oaths Act, 1868. The argument of the defendant was founded upon a misconception of the effect of that Act upon the Act of 1866, which really imposes upon a person a penalty for sitting and voting unless he has taken the oath. The argument assumes that he could, in some form or other, be prosecuted if he did not take the oath. But that is not so, and under the Acts to which the defendant has referred, a person who was unable by law to take the required oath could not be prosecuted for not taking it, and still less for not attending Parliament when he was ready and willing to attend and serve. The position of the defendant is however somewhat peculiar and anomalous, for although he is incapable of sitting and voting by reason of the Parliamentary Oaths Act, and although he is liable to penalties if he does sit and vote, whether he goes through the form of taking the oath or not, yet for some purposes he is a member of Parliament, and, as such member, is entitled to some privileges. But in order to ascertain what those privileges are, it is necessary to refer to *May's Treatise on Parliamentary Practice*; and the only question we have to consider is, what is the consequence of a person sitting and

voting without having taken the oath. The defendant then pressed upon us an argument based upon 1 & 2 Vict. c. 105—an Act to remove doubts as to the validity of certain oaths—and in particular upon section 5 of 30 & 31 Vict. c. 75, the whole of which argument is met by the observation that those Acts assume that the oath has been taken, and therefore only apply to a person who can take the oath. The conclusion at which I have arrived is that if the defendant's argument were to prevail, and if every member who uttered the words in the form in which the oath is required to be taken were to be held to be capable of uttering them as an oath, the oath would be reduced to a mere form. For certain reasons an oath, or, to meet the scruples of some persons, a solemn declaration, is required to be made, and, whatever the object may have been, the effect is to exclude all persons from sitting and voting in Parliament who, like the defendant, cannot lawfully make a declaration or take an oath, and to render them liable to penalties if they do sit and vote. It was said that that result was never contemplated—and whether it was or was not must be a matter of some speculation; but I am certainly not in a position judicially to hold that it was not contemplated. It is a mistake to suppose that persons who do not believe in a Supreme Being are in the position in which it is now supposed they are. There are certain old statutes which still remain unrepealed, and under which such persons can be cruelly persecuted. It is not for me to express any opinion whether that is a state of law which ought to remain or not; but, having regard to the fact that those statutes are unrepealed, I do not see my way judicially to hold that this oath was not kept alive by Parliament for the very purpose, amongst others, of keeping such people out of Parliament.

Judgment for the Crown.

Solicitors—Hare & Co., agents for the Solicitor to the Treasury, for the Crown; the defendant in person.

[IN THE COURT OF APPEAL.]

1884. Nov. 1, 3, 4. THE ATTORNEY-GENERAL (*at the relation of* THE WHITECHAPEL BOARD OF WORKS) *v.* HORNER.*

Market—Grant—Grantee not Owner of Land on which Market to be held—Public Streets—Dedication of, subject to Market—Usage—Lost Grant—Presumption.

The Crown can grant the right to hold a market on land of which the grantee is not the owner at the time when such grant is made.

By a charter of Charles 2 *the king granted to one B., his successors and assigns, the right to hold a market on two specified days, "in or near" a certain place called Spital Square. The market was bounded by four outer streets, into which four inner streets ran from the market at right angles to the outer streets.*

By certain Paving Acts of George 3 *the streets in the district in which the market was situate, including the outer and inner streets, were vested in certain commissioners, who, inter alia, had power to take proceedings against persons who obstructed the streets, and this power became vested in the Board of Works for that district by the Metropolis Management Act,* 1855.

The inner streets were made and dedicated to the public shortly after the grant was made, and the outer streets were made and dedicated at some time between that date and the passing of the Paving Acts. It had been the custom from time immemorial for the market to be held not only on the two days mentioned in the grant, but also on the four remaining week-days; and it had also been the custom for persons who had paid tolls to the owner of the market or his lessee for the privilege, to sell their goods in the outer streets, or as near to the market as they could get, when they were unable to do so either in the market itself or in the inner streets:—Held, *that the grant was a grant of a market without metes and bounds, and that the grantee was entitled to hold it both in the place named and also near it wheresoever the same should honestly extend.* Held also, *that both the outer and inner streets must be taken to*

* *Coram* Brett, M.R., Cotton, L.J., and Lindley, L.J.

have been dedicated to the public subject to the market rights of the grantee. Held also, ***that the right of the grantee to hold the market was restricted to the two days named in the grant; and that, as the origin of the right was known, there was no presumption arising from immemorial usage of a grant of a right to hold the market on the remaining week-days.*** Held also, ***that, notwithstanding the Paving Acts of George 3, the grantee was entitled to hold the market during market hours, and could not be interfered with even though an obstruction of the streets which but for such grant would amount to a nuisance was thereby caused.***

Appeal by the defendant from a judgment of Stephen, J.

By letters patent dated the 29th of July in the thirty-fourth year of Charles 2 (1682), which recited an inquisition founded on a writ of *ad quod damnum*, the king granted to one John Balch, his heirs and assigns for ever, the right to hold two markets in every week, the first of which was to be held on Thursday, and the other on Saturday, in or near—*in sive juxta*—a certain place called Spital Square, together with all tolls, tollage, piccage, stallage, and other profits, advantages, and emoluments whatsoever to such markets belonging, appertaining, arising, or happening, or with the same usually had or enjoyed.

By letters patent dated the 22nd of September, 1688, in the fourth year of James 2, the original grant was confirmed and ratified, and additional privileges were granted to the owner of the market; but the grant of the right to hold the market on Thursday was revoked, and instead thereof a right was granted to hold the market on Monday and Wednesday. The Court of Appeal, in *Goldsmid* v. *The Great Eastern Railway Company* (1), held that this second grant was void by virtue of the Act of 1690 (2 Will. & M. sess. 1. c. 8), which restored the charters and privileges of the city of London which had been set aside by a judgment on a proceeding by *quo warranto* in Trinity Term 35 Car. 2 (1683), and avoided all grants made after that judgment.

The market square was bounded by four streets, called the outer streets—namely, Lamb Street on the north, Commercial Street on the east, Brushfield Street on the south, and Crispin Street on the west. The area of the market so bounded included the market itself, known as Market Place, which occupied the centre of a square block of land, and also certain buildings. Four inner streets ran at right angles from the market to the four outer streets—namely, North Street, which ran into Lamb Street; East Street into Commercial Street; South Street into Brushfield Street, and West Street into Crispin Street. The piece of land on which the market stood, as well as the buildings and the inner streets, was the property of Balch at the date of the grant. The inner streets were made by the grantee shortly after the date of the grant, but the four outer streets were not made until some time between 1682 and the passing of the Paving Acts of Geo. 3.

By certain Paving Acts of George 3 (12 Geo. 3. c. xxxviii., 28 Geo. 3. c. lx., and 57 Geo. 3. c. xxix.), both the outer and the inner streets were, *inter alia*, vested in certain commissioners, to whom power was given to pave and repair, and to prohibit any obstruction and nuisances in the same, and certain penalties were imposed. The powers of the commissioners under these Acts became vested in the Whitechapel District Board of Works by virtue of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120).

The defendant claimed to be the lessee of the market under a lease granted to him by the freeholders of the market, who derived their title to the market from the charters above referred to.

The defendant having licensed persons to sell their goods from carts and waggons, not only in the four inner streets, but also in the four outer streets, the present action, which was in the nature of an information by the Attorney-General at the relation of the district board, was brought for an injunction to restrain the defendant from selling goods or licensing them to be sold or exposed for sale either in the outer or in the inner streets.

(1) 53 Law J. Rep. Chanc. 371; Law Rep. 25 Ch. D. 511; *in dom. proc.* 54 Law J. Rep. Chanc. 162; Law Rep. 9 App. Cas. 927.

Attorney-General v. *Horner, App.*

At the trial before Stephen, J., evidence was given on behalf of the defendant to shew that from time immemorial it had been the custom for those persons who were unable to get into the market to sell their goods in consequence of the market being full, to place and unload their carts and sell their goods in the surrounding outer streets, or as near to the market as they could get, and that they used to pay tolls to the owner of the market for the privilege of so doing. It was also proved that goods were sold and tolls taken for so doing, especially in summer, on other days of the week in addition to Tuesdays, Thursdays, and Saturdays, which were proved to be the usual market days. On the other hand the relators proved that at various times persons had been summoned and convicted for obstructing the streets with their carts and goods; but it did not appear whether the convictions were in respect of obstructing the streets out of market hours, and the convictions were not put in evidence.

Stephen, J., upon the construction of the grant, held that the defendant had a right to hold the market on Tuesdays, Thursdays, and Saturdays in the market itself and the inner streets, but not in the outer streets. A perpetual injunction was therefore granted, restraining him from exercising any rights of market in the outer streets; and an injunction was also granted restraining him from exercising those rights in the four inner streets on any days except Tuesdays, Thursdays, and Saturdays.

The defendant appealed. The relators also sought on the appeal to have the injunction as to the four inner streets varied by extending it to every week-day.

Sir H. Giffard, Q.C., and *Crossley, Q.C.* (with them *J. M. Solomon*), for the defendant.—The defendant can only rely on the charter of Charles 2, as it was the opinion, although not necessary to the decision, of the Court of Appeal and the House of Lords in *Goldsmid* v. *The Great Eastern Railway Company* (1) that the charter of James 2 was made void by 2 Will. & M. sess. 1. c. 8. The charter of Charles 2 is the grant of a market franchise without metes and bounds in or near —*in sive juxta*—the place named, and the grant is not confined to that place—*Dixon* v. *Robinson* (2). The Crown can grant the right to a man to hold a market on land of which he is not the owner at the time of the grant; such a grant is not illegal—*Lockwood* v. *Wood* (3). Moreover, markets can lawfully be held in a public street—*Mosley* v. *Walker* (4). The evidence amply establishes the fact that for many years it has been usual for the market to be held on the four remaining days of the week in addition to the Thursday and Saturday; a presumption, therefore, ought to be made in favour of a grant to that effect founded upon the evidence of usage—*The Mayor of Penrhyn* v. *Best* (5), *The King* v. *Smith* (6), and *Lawrence* v. *Hitch* (7). The Paving Acts of George 3 only empower the local authority to abate that which in the absence of the market rights would be an obstruction or a nuisance in the public streets—*Goldsmid* v. *The Great Eastern Railway Company* (1).

Finlay, Q.C., and *F. H. Colt* (*Francis Gore* with them), for the relators.—The grant made under the charter of Charles 2 must be restricted to the place defined in the inquisition; the right to hold the market, therefore, can only be exercised in that place. The grant can only be made by the Crown to a person who at the time of the grant is the owner of the soil in which the market is to be held, otherwise he could not sue if there were any interference with his market franchise—*The King* v. *Starkey* (8), *Mosley* v. *Walker* (4), and *Curwen* v. *Salkeld* (9). The grantee could undoubtedly hold the market on the land of another if he obtained the leave and licence of the owner of the land to do so. The Paving Acts of George 3 take away the right of the defendant to hold the market in the public streets, even though

(2) 3 Mod. 108.
(3) 6 Q.B. Rep. 31; 13 Law J. Rep. Q.B. 365.
(4) 7 B. & C. 52, 55; 5 Law J. Rep. (o.s.) K.B. 358.
(5) 48 Law J. Rep. Exch. 103; Law Rep. 3 Ex. D. 292.
(6) 4 Esp. 110.
(7) 37 Law J. Rep. Q.B. 209; Law Rep. 3 Q.B. 521.
(8) 7 Ad. & E. 95, 106, 107.
(9) 3 East, 538.

he cannot obtain any compensation for being so deprived of his right—*The Hammersmith Railway Company* v. *Brand* (10) and *The Metropolitan Asylum District* v. *Hill* (11). Where streets have been dedicated to the public, no grant can be made by the Crown to any person to hold a market in those streets. Here the four inner streets were so dedicated as not to be subject to the market rights. The market cannot be extended by persons improperly selling goods beyond the defined limits of the market, which here merely consists of the block covered by the market sheds; and as the inner streets were dedicated to the public by the owner of the market, there is no right to hold a market in those streets—*The Mayor of Manchester* v. *Lyons* (12). The evidence of usage is insufficient to establish a right to hold the market every day of the week. The words "*in sive juxta*" were properly construed by Stephen, J., and must not be taken to extend the right to hold the market both in the outer and inner streets, as claimed by the defendant. The origin of the market is known, and no lost grant ought therefore to be assumed even though there is evidence of long usage. Moreover, in the case of indictment, it would be no excuse for a defendant that the nuisance had been in existence for a great length of time—*Russell on Crimes* (13).

Sir H. Giffard, Q.C., in reply, referred to *Fitzherb. de Nat. Brev.*, tit. "writ *de libertatibus allocandis*," 229 B. (ed. 1794).

BRETT, M.R.—The substantial question in this case is whether the defendant has such a franchise of this market as will authorise him to do what he has done. He has given licences to people to sell vegetables and fruit during certain hours of the day from their waggons and carts and otherwise within certain streets, four of which I will call the inner streets and four the outer streets; and he has taken tolls in respect of such licences. The defendant gave evidence of a grant from the Crown of a market in certain terms, and he also gave evidence by witnesses of a usage without interruption for a period of at least forty years to give such licences, and of the right of the persons to whom the licences were given to act under that authorisation. The judgment of Stephen, J., is founded upon two views; for his Lordship first construed the charter of Charles 2 as being a franchise of a market only within the market square, which included the four inner streets; and then he decided that no franchise of a market can be granted by the Crown except to a person who at the time of the grant is the owner of the land on which the market is to be held. His Lordship then came to a conclusion as to what were the limits of the market. I am unable to agree with either of the propositions of law which were laid down. According to the interpretation so put upon the words of the grant, "*in sive juxta*," the grant would only be a grant of a market in the place named—that is, in Spital Square. The effect of that would be to strike out the words "*sive juxta*," and to give no meaning at all to them. Those words mean "in or near"; and the grant, although drawn up in Latin, is an English grant. A distinction was attempted to be drawn between the words "next" and "near"; but I can see none, and they must therefore be treated as meaning "in" or "near" to the place named. A market may be held by the grantee in the place named or near to it; and the grant being so expanded includes both. Any other construction of the grant would be contrary to the ordinary canon of construction that words must not be struck out unless it is absolutely necessary to do so. Stephen, J., struck out the words "*sive juxta*," because, being of opinion that no grant of a market could be made except to a person who at the time of the grant was the owner of the land, he thought them too large, and that according to their ordinary interpretation they would give to the grantee a franchise of a market over land of which he was not the owner. That brings me to the proposition whether it is true that the franchise of a market cannot be granted by the Crown except in respect of land of which

(10) 38 Law J. Rep. Q.B. 265; Law Rep. 4 H.L. 171.

(11) 49 Law J. Rep. Q.B. 745; Law Rep. 5 App. Cas. 582.

(12) Law Rep. 22 Ch. D. 287, 306.

(13) Vol. i. pp. 455, 456 (4th ed.), and at p. 442 (5th ed.)

the grantee is then the owner. The grant here does not assume to grant any land or interest in land; it grants the franchise of holding a market, and authorises a market to be held. The grant is made after an enquiry has been held whether it will be for the good of the public or to their detriment to make a grant of a market. There is therefore no reason for confining the grant to the land of the person to whom it is made. Upon authority also that proposition is not true. The opinion of Lord Tenterden in *Mosley* v. *Walker* (4) shews that the franchise of a market is not confined to a person who is at the time of such grant the owner of the land upon which it is to be held. It seems to me that Lord Denman also said the same thing in *Lockwood* v. *Wood* (3). I am therefore of opinion, both upon principle and authority, that the grant of a franchise of a market for the good of the public has nothing to do with the ownership of the land upon which the market is to be held. The grantee must hold the market within the limits specified in the grant, if the market is confined by metes and bounds; and if he cannot obtain the land so specified, or if he cannot get the leave or licence of the owner of the land upon which the market is to be held, then the franchise is useless to him. So, again, if the market be granted without metes and bounds, but he is unable to obtain by sufferance or otherwise an opportunity of holding the market in or near the place in respect of which the franchise is given to him, he will be prevented from holding the market. The grant by the Crown, however, still remains, and I see no reason why he should not hold the market at any time, if he should obtain the power or opportunity of doing so, even though he were unable to do so immediately after the grant had been made. There is, therefore, no reason for striking out the words "*sive juxta*." What is the true construction of the grant? It is a grant of a franchise to hold a market *in* the place named, and also *near* to it. The market is therefore a market without metes and bounds. Such a market extends so far as reasonable convenience requires from time to time that it should extend. If for a time the market is actually held within a reasonable space, then that space is during that time the extent of the market. But if the market continually expands, then, so far as it in fact honestly extends, that is the market for the time being. The market in this case is a market without metes and bounds, which may and will expand so far as it can honestly be held. It was urged that, even if this were so, the market could not be held in certain streets in the district, because the owners of certain land near to the place named had dedicated them as streets to the public, and an Act of Parliament which appointed commissioners, and vested the streets in them, empowered them to prevent any obstruction, including the obstruction which would be the inevitable result if the defendant granted licences to sell goods from carts and waggons in the streets. In answer to that, it was said that, taking the fact that the streets had been dedicated after the grant had been made, and the evidence that for so many years back from that date the streets had been used without real interruption except by the police for certain purposes, we ought to hold that the streets were dedicated subject to the franchise, and that it was never intended that such dedication should interfere with the market. The inner streets did not exist when the franchise was granted, but were made soon after by the persons to whom the franchise was granted and for the purposes of the market. A person to whom a franchise of a market had been granted would not, as it seems to me, immediately after the grant was made, dedicate his property to the public so that they could prevent him from holding the market. It seems to me that the four inner streets were dedicated by the owner of the land as streets subject to the franchise of the market. The four outer streets, although not dedicated by the owners of the market franchise, were dedicated by the owners of property in the neighbourhood of a market which was then being carried on within the four inner streets, and which it would be known was not confined merely to what may be called the inner market. It seems to me that the persons who laid out and dedicated to the public these outer streets, did so for their own advantage, and in order that the land next to these streets might become

more valuable as shop property, being in the neighbourhood of the market. The real inference to be drawn is that the persons who dedicated the four outer streets took that matter into account, and dedicated them subject to the right of a market being held in them, and therefore did not intend to interfere with the market. That being so, the outer and inner streets, although dedicated, would still remain subject to the market franchise, unless Parliament has interfered and taken away from a man property which was granted to him by the Crown.

It was urged on behalf of the relators that the Paving Acts of George 3 have that effect; and no doubt these Acts may apply to cases where carts or waggons obstruct the streets longer than is necessary in order to unload them. But if the Paving Acts of George 3 have interfered with or taken away the rights of the owner of the market franchise, the Legislature has done so without giving any compensation. It is, however, a proper rule of construction that an Act of Parliament is not to be construed as interfering with or injuring any person's rights without compensation unless it cannot be reasonably construed in any other way. It seems to me that a reasonable construction can be given to these Acts without producing such an injurious effect. The market does not last the whole of the day, and nothing would be more likely than that the persons who had the licence of the defendant under the franchise to stop the thoroughfares with their carts during the market might do so out of market hours. It would therefore be right that out of market hours the local authority should have power to interfere. There is, therefore, plenty upon which these Acts could take effect without injuring anybody, and they do not interfere with the rights granted under the franchise. It cannot be said that the grant by the Crown can be called a nuisance in law. This very point came before the Court of Appeal and the House of Lords in *Goldsmid* v. *The Great Eastern Railway Company* (1), in which the view was taken that the Paving Acts of George 3 had no effect whatever upon this franchise.

Then comes the question as to what are the days upon which the market can be held under the grant of Charles 2. It clearly only gives leave for it to be held upon two days; and the construction of the grant cannot be altered by any usage, however long it may have been. Even if it is shewn that from the day of the grant down to the present time the market has been held upon other days in the week, yet the grant is the origin of the right, and it cannot be enlarged by any usage. The market is therefore confined to the two days named in the grant. It was argued that there was evidence of usage to the effect that the market was held on the other days of the week in addition to the two days named, and, that being so, we ought in favour of that long usage to infer a lost grant—that is, that the Crown had made another grant of a similar market with the same terms for the other four days of the week. I am inclined to give great weight to that contention; but there is another charter—namely, that of James 2—which has been held to be bad; and inasmuch as the usage which has been relied upon may only be an extension of the market being held on days other than those granted by the charter of Charles 2, and is consistent with the grant made by James 2, which has been held to be void, it would not be proper to infer that the defendant by a separate grant from the Crown which has been lost has a right to hold a market on the other four days of the week. The defendant's right of market is therefore confined to the two days named in the grant of Charles 2; but inasmuch as the market is an expansive one, he is authorised to take tolls during market hours on the two days named from persons to whom he has given licences to sell their goods, not only within the four inner streets, but also within the four outer streets and wheresoever the market may honestly from time to time extend. If that be true, it becomes unnecessary to give any opinion whether the Crown can grant the franchise of a market to be held in public streets which are in existence at the date of the grant, or in streets which are not dedicated subject to the franchise. I for myself give no countenance to the doctrine that the Crown, after an enquiry has been made whether a grant will be

for the public benefit or not, could not validly grant a franchise to hold a market in a street which was already a public street. It might be well argued that the common law has entrusted to the Crown the exercise of this prerogative for the benefit of the public, and has made it the sole judge whether the grant of the franchise would be for the public benefit or not. It is not, however, necessary to give a final opinion on that point. In the result the defendant has succeeded in proving he is entitled to hold the market to the full extent upon the two days; but the relators have succeeded in shewing that the defendant has exceeded his rights by giving licences to persons to hold to sell their goods on days other than those which are named in the charter of Charles 2.

COTTON, L J.—The two questions here raised are—first, as to the place in which, and, secondly, as to the days of the week upon which, the franchise granted by Charles 2 can be exercised. The first question depends upon the charter, and we must consider whether the right to be exercised is limited by the charter to a piece of land defined by metes and bounds, or whether it is free from any such restriction. An opinion on that point, although not essential to the decision, was expressed both by the Court of Appeal and by the House of Lords in *Goldsmid* v. *The Great Eastern Railway Company* (1), that the market was not a market limited by metes and bounds. The charter of Charles 2 grants a right to hold a market *in sive juxta* a certain place called Spital Square. In 1648 a grant was made of the piece of land comprised in the defendant's lease, upon certain conditions as to keeping the place open; at that time that part of London consisted of open fields, and, becoming more populous, in 1682 the necessity for a market arose. No doubt Spital Square is on that part of the land which was conveyed in 1648. Mr. Justice Stephen at the trial was of opinion that the right to exercise the franchise was confined, by the words "*in sive juxta*," to a market within that piece of land. In my opinion that is an incorrect view. The right is to be exercised "in" or "near"—*sive juxta*—the place named; if the right is not to be exercised beyond the limits, then the words "*sive juxta*" would be wholly unnecessary, and the word *in* would of itself have been amply sufficient. By the addition of the words "*sive juxta*" it must have been intended that the owner of the franchise should have the right to exercise his franchise not only on the land conveyed to the original grantee, but also upon the land next to and adjoining the market if the necessities of the market should reasonably require it. The learned Judge, however, was of opinion that the Crown can only grant the franchise of a market to be held upon land of which the grantee is the owner, and that as the land upon which Spital Square now is was all that belonged to the grantee when the grant was made the words "*sive juxta*" were to be disregarded. I differ from him in that view as a matter of law. No doubt certain rights, such as stallage, which is an incident limited to the soil, are granted to the grantee of a market franchise which cannot be exercised except by the person who owns the soil upon which they are to be exercised. But the grantee would still have the right to take tolls, although some inconvenience might arise as to holding the market itself, unless the grantee obtained some right to hold it from the owners of the soil. It is not, however, law that the Crown can only grant a market franchise to a person who is the owner of the soil upon which the right is to be exercised; although it is true that the Crown cannot by a grant give power to the grantee to take land from its owner and use it for a market or for any other purpose. The question here is, whether, because at the time when the grant was made the grantee only had Spital Square, the words of the grant are to be confined to that place and it is to be held that the franchise can only be exercised there and not elsewhere. In my opinion that would not be the proper mode of construing the grant. Here Spital Square was pointed at as the place where the head of the market was to be; and the grantee might at any time have acquired other land. The question is, whether the grantee can exercise the right of franchise in the four inner streets which intersect the block of

buildings of which he is the owner, and also whether he can do so in the adjoining streets, that is, in the four outer streets. I am of opinion that he can do so in both. The outer streets, it is admitted, were not laid out and had not been dedicated to the public as streets at the date of the grant. The conclusion at which the Master of the Rolls has arrived as to the outer streets is the right one, that the surrounding owners when laying out their property did dedicate the outer streets to the public subject to the exercise of the market franchise. With regard to the four inner streets, it is impossible to suppose that the owner of the franchise when he was building the market in the central square would so dedicate the inner streets to the public as to prevent the market franchise being exercised by himself or his successors. I therefore do not differ from the judgment of Mr. Justice Stephen as to those streets. I do not withdraw from the opinion I expressed in *Goldsmid* v. *The Great Eastern Railway Company* (1), that to hold a market in a street without a franchise which authorised it would be a nuisance, but that if the franchise did authorise it then it would not be a nuisance. The remarks of Lord Justice Fry are also to the same effect.

It was then said that the relators here are the successors of the commissioners appointed under the Paving Acts of Geo. 3, and that these Acts have interfered with the rights of the defendant under the franchise, whatever those rights may be. But, in my opinion, that is not so. A reasonable construction to be put on these Acts is that they were only intended to give certain summary powers to the commissioners, and not to make illegal that which at the time when they were passed was legal, but only to enable the commissioners to restrain and summarily interfere with certain illegal things which were being done at the time when the Acts were passed. Those Acts were not intended to interfere with existing rights. The view which I have taken on this point is in accordance with that expressed by the Lord Chancellor in the House of Lords and by the Court of Appeal in *Goldsmid* v. *The Great Eastern Railway Company* (1).

Then comes the question whether the right of the owner of the franchise or his lessee can be exercised on any days besides those mentioned. The charter of Charles 2 limits the right to Thursday and Saturday; but the market has apparently been carried on every day of the week, and it was said that this had been done for many years. It was pressed upon us that, having regard to the usage which was proved at the trial, some grant by the Crown to hold a market on the other days ought to be presumed; but in my opinion that is wrong. If the question were merely whether there had been a grant or not, then the usage would justify us in holding that there had been some grant which authorised that to be done which for so many years was in fact done. It would not be right, having regard to the charter of Charles 2, to presume a lost grant simply from the evidence of usage, and especially as the grantee of the market, until recently, relied upon the grant of James 2—which was held to be void in *Goldsmid* v. *The Great Eastern Railway Company* (1)—as giving him another day.

The soil in these streets is vested in the district board simply as the representatives of the public; and as no damage has been sustained by them as owners of the soil, we should not be justified in making a decree in their favour, the effect of which would be to interfere with the right of the defendant to hold the market in those streets in which it has now become necessary to hold it by reason of the population having increased.

LINDLEY, L.J.—I concur. The question resolves itself into two enquiries—first, as to the rights of the grantee of the market under the charter of Charles 2, and under the usage which has been proved; and secondly, as to the extent to which those rights are affected, if at all, by the Paving Acts of Geo. 3. The only charter which is now available, and which was upheld in *Goldsmid* v. *The Great Eastern Railway Company* (1), is the charter of Charles 2, by which the grantee obtained the right to the franchise of a market in or near Spital Market, for the sale of fruit and vegetables on Thursdays and Saturdays. At the time when that charter was granted,

the grantee, one Balch, was the owner of a plot of land called Spital Square, and he could, whether there was a charter or not, and whether there was a franchise or not, buy or sell vegetables on that square because he was the owner of the soil. A monopoly was therefore granted to him by the charter—for that is what a market franchise means—and it was to be enjoyed by him in or near Spital Square—unless the words "*sive juxta*" are rejected, as was done by Mr. Justice Stephen in the Court below, as having no meaning. I do not think that is the true construction of the charter. It was construed in the Court below as if the right was only to be exercised on the square block of land of which Balch was the owner when the grant was made, and the present action is based on the theory that the right of the present lessee of this market franchise was to be confined to the centre part of that square block which is covered with the market sheds. The construction of the charter, however, is what I have said, and is so far the view taken by the Court of Appeal and the House of Lords in *Goldsmid* v. *The Great Eastern Railway Company* (1). Now it is said that the Crown cannot grant a market franchise to a man to be exercised off his land; but *Lockwood* v. *Wood* (3) only shews that although the Crown can grant a market franchise to a man, it cannot grant a right to the grantee to go upon another person's land to exercise the franchise. The grantee can only exercise the franchise by obtaining the right, by licence or otherwise, to go upon the land. The point whether the Crown can by charter grant a man a right to hold a market in a public street so as to obstruct the thoroughfare does not now arise, but it is one about which I have some doubt.

Let us now see to what extent the grant goes; it would entitle Balch or his successors to hold a market on the whole of the land of which he was then the owner, and this would include the four inner streets. Then the words "*sive juxta*" would authorise the extension of the market beyond those limits with the consent of the owners of the adjoining land. We are in a state of uncertainty as to what was done between the granting of the charter of Charles 2 and the passing of the Paving Acts of Geo. 3. But we know that the four inner streets had been made on the block of land of which the grantee was the owner, and that they were public streets. We also know that one of the four outer streets —Commercial Road on the east—and some other streets were then in existence; but when they were first formed, and whether the market had overflowed before the passing of the Paving Acts of Geo. 3, is not known with any accuracy. We do, however, know as a fact that the market rights have been exercised for many years in the outer streets; and we ought therefore to infer from that evidence that these market rights were in fact exercised over these four outer streets with the consent of the owners of the land when those streets were made and dedicated to the public. I therefore come to this conclusion, that the market was in existence and was carried on in the four inner streets at the time when the Paving Acts of Geo. 3 were passed, and that the four outer streets, judging from the evidence of usage given, were dedicated to the public subject to the right of the owner or lessee of the market to use them for the purposes of the market if and when necessary. The Paving Acts of Geo. 3 are somewhat startling, for they would seem to vest the whole of the marketplace, including the streets, in the commissioners, and to give them the right to interfere with the market. But that would amount to confiscation, and is a conclusion at which no one, unless compelled to do so, would arrive. The decision of the Court of Appeal in *Goldsmid* v. *The Great Eastern Railway Company* (1), and one which was not dissented from by the House of Lords, was that those Acts must be so construed as not to be inconsistent with the market rights granted by the charter, whatever those rights may be. There is no difficulty in working out that conclusion, for the rights are only to be exercised on Thursdays and Saturdays, and the Acts give the authorities power to maintain order and prevent obstructions in the streets, both on the days when the market is not held and also on the market days, except during the hours when the market is being held. Therefore the paving commissioners, and the local board in

whom the streets are now vested, can only exercise their powers in subordination to the market rights, which are not limited to the covered marketplace or to the four inner streets, but extend *juxta* or near Spital Square into the four outer streets.

There is a difficulty with regard to the days in which the market may be held. The charter of Charles 2 only mentions Thursday and Saturday; and the charter of James 2 gave a right to hold the market on Monday and Wednesday instead of on Thursday. The grantee therefore had the right under the two charters to hold the market on Monday, Wednesday, and Saturday; but the Act of 2 Will. & M. sess. 1. c. 8 rendered the charter of James 2 void; consequently the defendant can only rely on the charter of Charles 2. We have been asked to infer, from the evidence of usage which has been given, and which shewed that the market rights have been exercised every day of the week, that a charter had been granted giving a right to hold the market on those days. I do not, however, think we are bound or ought to go so far as to hold that there has been such a grant. The cases as to presumptions from long usage are cases in which the origin of the alleged rights has been lost in obscurity, and in which the only evidence is that of immemorial user; but there is nothing of that kind here. The origin of the franchise which is said to exist is known, and we must therefore hold that this franchise is restricted to Thursdays and Saturdays; but the right of the defendant to sell on other days will not be interfered with, for he will still have his right to sell, although he will not have a monopoly.

Judgment reversed.

Solicitors—A. Turner & Son, for relators; E. Betteley, for defendant.

1885. Jan. 19. } WEBSTER *v.* ARMSTRONG.

Estoppel — Counter-claim — County Court—Action in High Court for same Cause of Action—Effect of Verdict and Judgment in County Court—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *ss.* 89 *and* 90.

Where in an action in a County Court a defendant has relied upon a cause of action by way of counter-claim, upon which he has obtained a verdict for an amount beyond the jurisdiction of the County Court, and judgment has been entered for the defendant, but no relief has been given in respect of the balance in excess of the plaintiff's claim, the defendant is not estopped from afterwards bringing an action in the High Court upon the same cause of action.

The defendant in the High Court is estopped by the verdict and judgment of the County Court from denying the cause of action of the plaintiff in the High Court, and the only question to be decided in the High Court is the amount of damages.

Trial in Middlesex before Mathew, J., without a jury, pursuant to an order of a Master at chambers, of certain points of law and issues of fact, if any, before the trial of the other issues in the action.

The claim was for damages in respect of the following matters:—1. Fraudulent misrepresentation by the defendants of the takings of a public-house upon the sale of the lease &c. of the house by the defendants to the plaintiff; 2. Breaking and entering the said public-house; 3. Trespass and conversion of the pictures of the said house; 4. Assault.

The statement of defence was to the following effect:—1. Denial of the making of the representations; 2. Allegation that the representations were true; 3. Denial of breaking and entering; 4. Justification of the breaking and entering under the terms of the lease; 5. Denial of conversion of the pictures and denial that they were the plaintiff's property; 6. Denial of assault; 7. Denial of damages; 8. Allegation that after the issue of the writ in this action, and before delivery of the

statement of claim, the now plaintiff in an action for 40*l.* 18*s.* for goods sold and delivered, brought against her by the now defendants in the Sussex County Court, counter-claimed against the now defendants in respect of the same identical causes of action mentioned in the claim, with the following result—namely, that as to 2, the jury found that the now defendants did break and enter the now plaintiff's premises, but that the now plaintiff had sustained no damage thereby; as to 3 and 4, the Judge held there was no evidence to go to the jury; and as to 1, the jury found a verdict for the now plaintiff for 250*l.* damages.

Reply.

1. Joinder of issue.

2. Allegation that inasmuch as the verdict for the now defendant in the County Court was beyond the amount in respect of which the County Court had jurisdiction, the Court gave judgment for the now plaintiff upon the now defendant's claim, and gave no judgment for damages on the ground that the Court had no jurisdiction to give such judgment for damages; and, alternatively, that the plaintiff only seeks to recover damages beyond the sum of 40*l.* 18*s.*, of which benefit has been obtained.

3. That the defendant ought not to be allowed to plead defences 1 to 7 inclusive, because all these defences have been raised in the County Court in answer to the now plaintiff's counter-claim, and determined by the verdict of the jury and judgment of the Court.

A. C. Nicoll, for the defendants, claimed the right to begin; but *Finlay, Q.C.*, for the plaintiff, who submitted that the plaintiff was in the position of a demurring party, was called upon by Mathew, J.

Finlay, Q.C. (*Maurice Powell* with him), for the plaintiff, submitted, first, that the plaintiff was not estopped from bringing this action by reason of the proceedings in the County Court, citing in support of this contention the expressions of Brett, L.J., Cotton, L.J., and Thesiger, L.J., in delivering judgment in *Davis* v. *The Flagstaff Silver Mining Company of Utah* (1), especially the *dictum* of Thesiger, L.J., as reported at p. 509 of the Law Journal Reports; and secondly, that the verdict in the County Court was conclusive of the plaintiff's cause of action, and the only question to be decided in this action was the amount of damages, citing *Flitters* v. *Allfrey* (2).

A. C. Nicoll, for the defendants, contended that the plaintiff might have removed the County Court proceedings into the High Court, and obtained the full benefit of the causes of action, the subject of the counter-claim; not having done so, the plaintiff was estopped from now proceeding in the High Court upon the same causes of action. He referred to the Judicature Act, 1873 (36 & 37 Vict. c. 66), ss. 89 and 90.

[MATHEW, J.—The defendant in the County Court is not entitled as of right to remove the action into the High Court; the words of the statute are, "if it shall be thought fit."]

The passing of the Supreme Court of Judicature Act, 1884 (47 & 48 Vict. c. 61), s. 18, shews there was a difficulty felt. He cited *Austin* v. *Mills* (3), *Berkeley* v. *Elderkin* (4), and *Wright* v. *The London General Omnibus Company* (5).

MATHEW, J.—I think my judgment must be for the plaintiff. The difficulty arises from the peculiar legislation upon the subject contained in sections 89 and 90 of the Judicature Act, 1873. I think it was the intention by these sections to enable a defendant in a County Court to avail himself of a cause of action as a defence, though he might not be entitled to make a claim for the matter in the County Court. The inferior Court has jurisdiction apparently only for the purpose of enabling a defendant to defend, but has no jurisdiction for ulterior proceedings in order that complete justice may be done. Mr. Nicoll says the plaintiff must be taken to have abandoned the rest of his claim; but if that was the intention of the Legislature it ought to have said so. Mr. Nicoll says in section 90 there is a provision enabling

(1) 47 Law J. Rep. C.P. 503; Law Rep. 3 C.P. D. 228.

(2) 44 Law J. Rep. C.P. 73; Law Rep. 10 C.P. 29.

(3) 9 Exch. Rep. 288; 23 Law J. Rep. Exch. 40.

(4) 1 E. & B. 805; 22 Law J. Rep. Q.B. 281.

(5) 46 Law J. Rep. Q.B. 429; Law Rep. 2 Q.B. D. 271.

the defendant to remove the plaint into the Superior Court, and if the plaintiff does not do so the penalty is that he loses the rest of his claim. If the claim were a liquidated one made up of several items, it would be grossly unjust that the defendant should be debarred from proceeding to recover the items beyond those set off against the claim. Further, there is not the right to remove the plaint into the Superior Court. If the Judge should not think it fit to remove the plaint, is the defendant to suffer this penalty? Mr. Nicoll can cite no direct authority. The only authority is against him. It may be said that that only consists of *dicta*. But these *dicta* are against him, and are as nearly decisions against him as can be. I think they are right.

As to the other question, that the defendant is estopped from denying the plaintiff's right of action, I think that the judgment was the judgment of a competent Court upon the same matters and between the same parties. My judgment, therefore, must be for the plaintiff.

Judgment for the plaintiff, with costs in any event.

NOTE.—See now the Supreme Court of Judicature Act, 1884 (47 & 48 Vict. c. 61), s. 18.

Solicitors—C. G. Hobbs, agents for Davenport, Jones & Glenister, Hastings, for plaintiff; Senior, Attree & Johnson, agents for Charles Sheppard, Battle, for defendants.

[IN THE COURT OF APPEAL.]

1884. Dec. 8. THE MAYOR ETC. OF OVER DARWEN *v.* THE JUSTICES OF LANCASHIRE.

Highway — Main Road — Repair — Costs of Maintenance — Contribution — "County"—"County Authority of the County in which such Road is situate"— Highway Act, 1862 (25 & 26 *Vict. c.* 61), *s.* 2—*Highways and Locomotives (Amendment) Act*, 1878 (41 & 42 *Vict. c.* 77), *ss.* 13 *and* 38.

[For the report of the above case, see 54 Law J. Rep. M.C. 51.]

[IN THE COURT OF APPEAL.]

BANKRUPTCY. 1885. Feb. 27. *In re* SALAMAN; *ex parte* SALAMAN.*

Bankruptcy—Application for Discharge —Facts requiring Refusal or Conditional Order—Retrospective Operation — Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 28 (3)—"*Rash and Hazardous Speculations.*"

The acts and omissions of the bankrupt mentioned in section 28 (3) *of the Bankruptcy Act*, 1883, *requiring an order for discharge to be refused, suspended, or conditionally granted, need not have happened after the Act came into operation.*

Appeal by the bankrupt from a decision of Mr. Registrar Pepys refusing an unconditional order of discharge on the ground that the bankrupt had been guilty of rash and hazardous speculations, and allowing his discharge only on his filing accounts from year to year and paying all his yearly income to the trustee, except 300*l.*, until he should have paid ten shillings in the pound.

The receiving order was made on the 14th of August, 1884, and a bankruptcy and summary administration were ordered, with the official receiver as trustee. The application for discharge was made on the 4th of November. It appeared from the report of the official receiver that from 1877 to 1881 the bankrupt had been engaged in a speculation in regard to certain property which he had bought in Tokenhouse Yard in the city of London. In 1878 he had also engaged in speculation on the Stock Exchange.

The Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 28, provides that on the application of a bankrupt for his discharge the Court shall either refuse the order or suspend it, or grant an order conditional with respect to his earnings or income which may afterwards become due to the bankrupt, or with respect to his after-acquired property, on proof, among other facts, that "the bankrupt has brought on his bankruptcy by rash and hazardous speculations."

* *Coram* Brett, M.R., Baggallay, L.J., and Lindley, L.J.

Cooper Willis, Q.C., and *S. Woolf*, for the bankrupt, argued that, as the alleged speculations took place before the Act came into operation, the Registrar had no power to impose the condition. They relied on *Ex parte White; in re White* (1), in which Lord Westbury decided this very point under the Act of 1869; and they also referred to *In re Staner; ex parte Staner* (2) and *In re Dornford; ex parte Dornford* (3).

H. Reed, for a creditor, and *J. McDonell*, for the official receiver, were not heard.

BRETT, M.R.—The first point in this case arises upon the construction of the Act. It is said that if the bankrupt has been guilty of rash and hazardous speculation before the Act of 1883 came into operation, the Court cannot, under section 28, consider that fact upon his application for his discharge. It is said that to do so would make the section retrospective. In my opinion it does not make the section retrospective if we do so. The section, in fact, in dealing with something which happens after the Act, lays down certain rules for the guidance of the Court in doing what it has to do after the Act. All that is required is that the bankrupt be adjudged after the Act. The Court is bound to refuse the discharge where the debtor has committed a misdemeanour under the Act or under Part II. of the Debtors Act, 1869. A misdemeanour under the Act cannot be committed until the Act is in operation, but a misdemeanour under the Debtors Act may be committed before the coming into operation of this Act. Next we come to facts which have to be considered with a view to refusing, suspending, or conditionally granting the discharge. The first of these is that "the bankrupt has omitted to keep such books of account as are usual and proper in the business carried on by him." That is something which applies to a trader, but is it a new view of right and wrong? It always has been a blemish on a trader's character not to keep books. Next we must consider his continuing to trade after knowing he is insolvent, and contracting debts without reasonable expectation of paying them. Is that a new impropriety? Then we must consider whether he has brought on his bankruptcy by rash and hazardous speculation. That is not manufacturing a wrong; it is taking notice of a wrong which has existed ever since trading was known. To read the Act as the bankrupt would have us read it, we must introduce the words "since the passing of the Act." In the case of *In re White* (1) Lord Westbury's decision was based on section 159 of the Bankruptcy Act, 1861, which created offences. The offence of contracting debts without reasonable expectation of paying them, and the other offences under sub-section 3 of that section, are punishable by imprisonment for a period not exceeding a year. The acts mentioned are treated as crimes, and there is a proviso that no person shall be liable to any "criminal proceedings or penalty" in respect of anything which occurred before the Act. There is no such proviso in this Act. The facts to be considered on an application for a discharge are not treated as criminal things, but as wrong things, and the proviso to section 159 of the Act of 1861 is purposely left out. In the case of *Ex parte Dornford; in re Dornford* (3) it was held by Vice-Chancellor Knight-Bruce under the 198th section of the Bankruptcy Act, 1849, that acts done before the statute might be looked at in considering the grant of the certificate; and so in *Ex parte Staner; in re Staner* (2) by Lord Cranworth and Lord Justice Knight-Bruce. The judgment of Lord Westbury is consistent with these cases and our present decision. It is said that the Registrar was wrong in holding the bankrupt guilty of rash and hazardous speculations; but I cannot doubt upon the facts that he was right. The order, in my opinion, is probably only too lenient.

BAGGALLAY, L.J.—I am of the same opinion. If it were the law that the facts required to be considered by section 28, sub-section 3, must be facts happening before the Act, paragraph (*a*), which is that the bankrupt has omitted to keep

(1) 33 Law J. Rep. Bankr. 22.
(2) 2 De Gex, M. & G. 263; 21 Law J. Rep. Bankr. 56.
(3) 4 De Gex & S. 29; 20 Law J. Rep. Bankr. 7.

books of account disclosing his financial position within three years preceding his bankruptcy, would be a dead letter until three years after the coming into operation of the Act.

LINDLEY, L.J.—I am of the same opinion. It is said that to decide as we do is to give the Act a retrospective operation. I think not. Everything essential is prospective. The adjudication is after the Act; and the application for a discharge is after the Act. We are asked to say that we are bound to give the bankrupt his discharge, however abominable his conduct has been, because he did not know when he was guilty of it that it would imperil his discharge if he became bankrupt.

Appeal dismissed.

Solicitors—Linklaters, for bankrupt; F. Laurence, for opposing creditor; W. W. Aldridge, for official receiver.

BANKRUPTCY. 1885. March 6. } *In re* WHITEHEAD; *ex parte* ROUTH.

Husband and Wife — Gift — Parol Agreement before Marriage—Conduct of Husband afterwards.

A parol agreement before marriage that money of the intended wife at the bank shall be hers for her separate use, followed by the wife dealing with it with the husband's knowledge, and the husband not interfering, held to amount to a gift to the wife for her separate use.

Appeal of Harriet Whitehead from the judgment of Cave, J., reported *ante*, p. 88, overruling the Judge of the County Court at Leeds, and declaring that the trustee was entitled to a sum of 1,350*l.*

The appellant before her marriage with the bankrupt on the 11th of September, 1879, was a widow, entitled to real and personal property under the will of her late husband. A settlement of the real property was made on her marriage; but with regard to the sum in question, which was at that time on deposit at a banker's in the widow's name, it was orally agreed between the husband and the intended wife, in order that she might have fuller control over it, that it should not be vested in trustees, but that she should have free use and control of it without the interference of her husband. After the marriage the money remained in the bank in the wife's widow name, and she drew upon it from time to time. In March, 1882, there were disagreements between the husband and the wife. The husband attempted to obtain the money from the bank, and the wife drew it out, putting it into another bank in the name of a trustee. On the 29th of November the bankrupt filed a petition for liquidation.

Warmington, Q.C., and *C. Dodd*, for the wife.—Cave, J., decided against the wife on the ground that the 4th section of the Statute of Frauds applied. We submit that it does not, as we are here in the position not of *actores* but of defendants, and the section does not avoid the agreement, but only forbids an action being brought. On this point they cited *Simmons* v. *Simmons* (1), *Crosby* v. *Wadsworth* (2), and *Leroux* v. *Brown* (3). The case of the wife, however, may be put on the ground that the ante-nuptial agreement followed by the acquiescence of the husband is evidence of a gift to the wife.

Cooper Willis, Q.C., and *Warrington*.—There is no evidence of a gift. The husband simply did nothing. They referred to *Warden* v. *Jones* (4)—in which it was held that a post-nuptial settlement after an oral arrangement before marriage was voluntary—and *Surcombe* v. *Pinniger* (5).

BRETT, M.R.—In this case I do not give an opinion upon the question of the Statute of Frauds; but I must not, by giving the go-by to the point, be taken to have adopted the view of Mr. Justice Cave. With regard to the doctrine of part performance, I do not think it is to be relied on in this case, and I say nothing as to reduction into possession. But, in my opi-

(1) 6 Hare, 352.
(2) 6 East, 602.
(3) 12 Com. B. Rep. 801; 22 Law J. Rep. C.P. 1.
(4) 2 De Gex & J. 76; 27 Law J. Rep. Chanc. 190.
(5) 3 De Gex, M. & G. 571; 22 Law J. Rep. Chanc. 419.

nion, the husband in this case gave this money to his wife for her separate use, and made himself her trustee. It is a question of fact and inference. If an ordinary tradesman marry a woman who has money, he does not act as the bankrupt acted, unless he means her to hold it for her own. If, in order to induce her to marry him, he promised her that she should keep the money, he would, if he was an honest man, be expected to keep his promise afterwards. This husband promised her that the money should be hers for her separate use, and he kept his promise, meaning to give it her. Is it likely he would have acted as he did if he meant otherwise? The money was at a bank in her name, and she drew upon it. We are asked to say that he knew nothing about her dealings with it, and that all this was done without her husband's knowledge. The only inference to be drawn is that he did know about it. It is said that he did nothing. But if a man says to his intended wife that he will let her keep her money as her own, and then lets her keep it, this is a course of conduct amounting to a gift. He is therefore a trustee, and his trustee in bankruptcy has no right to it.

BAGGALLAY, L.J. — The ante-nuptial parol agreement need not be relied upon except as an indication of intention. By the husband's conduct there was a gift to her of what he might have taken on the marriage.

LINDLEY, L.J.—I am of the same opinion. When we look at the facts and the agreement, which cannot be ignored, whether valid or not, it seems irresistible that he gave her the money. With regard to the cases cited, and also the recent case of *Britain* v. *Rossiter* (6), I think the effect of the Statute of Frauds is that these parol agreements are not to be enforced.

Appeal allowed.

Solicitors—Pitman & Sons, agents for Malcolm & Hainsworth, Leeds, for respondent; H. A. Maude, agent for W. Emsley, Leeds, for appellant.

(6) 48 Law J. Rep. Exch. 362; Law Rep. 11 Q.B. D. 123.

[IN THE COURT OF APPEAL.]

1885. March 7. } BARKER *v.* LAVERY.*

Practice—Stay of Execution for Costs—Appeal to the House of Lords—Special Circumstances.

The Court will not stay execution for costs, pending an appeal to the House of Lords, upon payment into Court of the amount, without the inability of the respondent to repay the amount or other special circumstances being shewn.

Original motion by the defendant for a stay of execution for costs pending an appeal by him to the House of Lords.

Beddall moved for a stay on payment of the costs into Court.

[BRETT, M.R.—Have you an affidavit that the plaintiff is not capable of repaying the costs if the appeal be decided against him?]

No. I rely on *Morgan* v. *Elford* (1), *Wilson* v. *Church* (2), and *Merry* v. *Nickalls* (3), and several other cases in which a stay was ordered.

[BRETT, M.R.—We have recently in two or three cases peremptorily refused such an application without special circumstances.]

There are no special circumstances mentioned in the cases referred to. Perhaps an affidavit shewing special circumstances might be made.

A. J. Ashton, for the plaintiff, was not called upon to argue.

THE LORD CHANCELLOR (EARL OF SELBORNE).—Those who come to make applications of this sort should be prepared with all their materials. I do not think that this order is a matter of course.

BRETT, M.R.—I am of the same opinion, and I hope this application will be reported, so that we may have the weight

* *Coram* Earl Selborne, L.C., Brett, M.R., and Lindley, L.J.

(1) Law Rep. 4 Ch. D. 352.

(2) Law Rep. 12 Ch. D. 454.

(3) 42 Law J. Rep. Chanc. 479; Law Rep. 8 Ch. App. 205.

of the opinion of the Lord Chancellor added to our own.

LINDLEY, L.J.—I am of the same opinion, and the motion must be refused with costs.

Motion refused.

Solicitors—Goodhart & Medcalf, for plaintiff; Lumley & Lumley, for defendant.

[IN THE QUEEN'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

BANKRUPTCY. 1884. Dec. 15, 16. 1885. Feb. 20. } *In re* PARKER AND COMPANY; *ex parte* TURQUAND.*

Bill of Sale—Transfer—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *ss.* 4 *and* 10 *—Reputed Ownership—Hotel Furniture —Bankruptcy.*

An agreement accompanying the deposit of a registered bill of sale by way of equitable sub-mortgage is a "transfer or assignment" of a bill of sale which by section 10 *of the Bills of Sale Act*, 1878, *need not be registered.*

The existence of the general habit among hotel-keepers of hiring the hotel furniture excludes the idea of reputed ownership altogether in regard to such furniture, and not merely when the true owner is the lender of the furniture.

Application of the trustee to have the furniture, plate, &c., in the Beach House Hotel, Westgate-on-Sea, delivered to him as the property of the bankrupt.

On the 23rd of February, 1881, Dyson, then the proprietor of the hotel, gave a bill of sale of the furniture in question to Davis. This bill of sale was duly registered. On the 7th of November following, Davis transferred this bill to the bankrupts. This transfer was not registered. On the 28th of November following the bankrupts deposited the bill of sale and the transfer, among other securities, with Coutts & Co., bankers, by way of equitable mortgage evidenced by a memorandum of agreement, to secure an advance of money. On the 12th of October, 1882, the bankrupts acquired the interest of Dyson in the hotel, including the equity of redemption under the bill of sale of the 23rd of February, 1881. From that date to the bankruptcy of Parker & Co., in 1884, the bankrupts carried on the business of the hotel by a manager. Coutts & Co. claimed the goods under their equitable mortgage.

Dec. 15, 16.—*Cooper Willis, Q.C.*, and *J. Linklater*, for the trustee, contended, first, that the goods were in the order and disposition of the bankrupts at the time of the bankruptcy; and, secondly, that the agreement between Coutts & Co. and the bankrupts required registration. They referred to *Ex parte Tweedy; in re Trethowan* (1) and *Ex parte Dalglish; in re Wilde* (2).

Vaughan Hawkins, for Coutts & Co., cited *Crawcour* v. *Salter* (3), *Ex parte Shaw* (4), *Ex parte Brooks; in re Fowler* (5), *Ex parte Lovering; in re Jones* (6), *Ex parte Watkins; in re Causton* (7), and *Horne* v. *Hughes* (8).

Cooper Willis, Q.C., in reply.

CAVE, J.—In this case the trustee applies for an order for delivery up to him of certain furniture in an hotel.

As to the first question, whether the goods were in the order and disposition of the bankrupts at the time of the bankruptcy, I am clearly of opinion that the case of *Crawcour* v. *Salter* (3) is conclusive. The effect of that decision is that there is a custom for hotel-keepers to hire furniture so well known and clear that no

* *Coram* Earl Selborne, L.C., Brett, M.R., and Lindley, L.J.

(1) 46 Law J. Rep. Bankr. 43; Law Rep. 5 Ch. D. 559.
(2) 42 Law J. Rep. Bankr. 102; Law Rep. 8 Chanc. 1075.
(3) 51 Law J. Rep. Chanc. 495; Law Rep. 18 Ch. D. 30.
(4) 46 Law J. Rep. Bankr. 114.
(5) Law Rep. 23 Ch. D. 261.
(6) 43 Law J. Rep. Bankr. 116; Law Rep. 9 Chanc. 621.
(7) 42 Law J. Rep. Bankr. 50; Law Rep. 8 Chanc. 520.
(8) 50 Law J. Rep. Q.B. 403; Law Rep. 6 Q.B. D. 676.

person dealing with the hotel-keeper ought to assume because the hotel-keeper is in possession of furniture that that furniture belongs to him. Therefore that point fails.

The second point is on the Bills of Sale Act, 1878, and is more difficult. [The learned Judge stated the facts as set out above.] Now the question arises, whether, in the events which have happened, the document of the 28th of November, 1881, is void as not being registered. [The learned Judge having read the recital in the Bills of Sale Act, 1854, proceeded:] That was the evil against which the Bills of Sale Acts were framed, that a person might be apparently in the possession of a quantity of goods, and yet might by a secret bill of sale have denuded himself of the property in those goods. In this case there was originally a bill of sale executed by Dyson in favour of Davis. That bill of sale required to be registered, and was registered. The right to seize and take possession was in one person, the apparent ownership and possession in another. Then came an assignment from Davis to Parker & Co., and then a further assignment, or whatever name you choose to give it, from Parker & Co. to Messrs. Coutts & Co. Now, in my judgment, at all events in the events which have happened, this did not require to be registered. At the time this document was executed Messrs. Coutts & Co. had a right to seize, not the goods of Parker & Co., but the goods of Dyson. It transferred to them the power to seize Dyson's goods, which had originally been given to Davis. Now in this case Parker & Co. have possession, but they have possession under a right which did not exist at the time of the execution of the memorandum of November, 1881, and was not acquired through any document executed to them before that memorandum, but was acquired by virtue of the subsequent purchase from Dyson. Therefore, it seems to me that they are, in point of fact, in the same position as if they had been entirely new purchasers; and that the fact that the persons who have acquired the right to these chattels subsequently from Dyson, and who were in possession at the time when the act of bankruptcy occurred, should be the same persons who had actually assigned their mortgage to Messrs. Coutts & Co. is a mere accident. Their possession does not take its rise from any right which was in existence at the time the memorandum of November, 1881, was executed; they were in possession solely by virtue of the conveyance from Dyson. The case is neither within the mischief nor the words of the Act. Messrs. Coutts & Co. are entitled under a document which at the time it was given did not require to be registered. The result, therefore, is that the application must be refused with costs.

Motion refused with costs.

The trustee appealed.

Feb. 20.—*Cooper Willis, Q.C.*, and *J. Linklater*, for the trustee.—The furniture was in the reputed ownership of the bankrupt (8). *Crawcour* v. *Salter* (3), in which the Court took judicial notice of the habit of hotel-keepers to hire goods, and held that it took the furniture of an hotel-keeper out of his reputed ownership, is distinguishable. In that case there was a hiring agreement, and in this case there was none. It may be the law that a creditor who trusts a hotel-keeper must take the risk of his having hired his furniture, but it does not follow that he must take the risk of any one not the lender of the furniture being the true owner.

[THE LORD CHANCELLOR referred to *Ex parte Watkins; in re Causton* (7).]

The custom must be kept within its limits. In *Ex parte Brooks; in re Fowler* (5) it was held that it must not be extended to private houses. They also cited *Priestley* v. *Pratt* (9), and the judgment of Kelly, C.B. As to the non-registration of the agreement between Coutts & Co. and the bankrupt, it ought to have been registered. It was "an agreement by which a right in equity to personal chattels" was conferred within the meaning of section 4 of the Bills of Sale Act, 1878, and it was not "a transfer or assignment" within section 10. That latter section only refers to absolute transfers, and not to transfers by way of mortgage. When an absolute transfer takes place, the transferee is substituted for the transferor

(9) 36 Law J. Rep. Exch. 89; Law Rep. 2 Exch. 101.

as grantee, and the name of the grantor remains on the register as a warning to creditors. But if a grantee of the bill sub-mortgages instead of transferring it, he retains an interest, and can always, by buying the equity of redemption of the grantor, obtain possession of the goods and keep them without his name appearing on the register. This is within the mischief of the Act.

Macnaghten, Q.C., and *Vaughan Hawkins*, for Coutts & Co., were not called upon.

THE LORD CHANCELLOR (EARL OF SELBORNE).—The argument which has been addressed to us in regard to reputed ownership is, I think, based upon a misapprehension. When there is a custom, such as is common among hotel-keepers, to hire the hotel furniture, every one knows that the chattels in the possession of the person in question may or may not be his, and the doctrine of reputed ownership is absolutely excluded. If the custom applied only to certain articles, such, for example, as chairs and tables and not crockery, then it might be different; but the custom applies to furniture of all kinds. The result of the custom is that the furniture in the possession of the hotel-keeper is presumptively not his. The reputation does not apply to particular articles but to all. When there is such a general custom as to exclude reputed ownership, it makes the creditor give credit at his own risk. The question he should ask is not, Is the furniture hired? but, Is it your own?

As to the other argument, I think the answer to it is reasonably clear. If the bankrupts had had an absolute title by possession at the time of the equitable mortgage to Coutts & Co., then I think there ought to have been registration. But at that time the title of Dyson was not exhausted. They had a right to hold Dyson's goods under the registered bill given to Davis. The statute expressly says that a transfer need not be registered, and makes no distinction between equitable and legal transfers, or where there is an equity of redemption in the transferor. I think Mr. Justice Cave was right in holding the case governed by the 10th and not by the 4th section.

BRETT, M.R.—The question in this case is whether certain things were within the order and disposition of the bankrupt. It has been held that the habit of hiring furniture in hotels is so notorious that the doctrine does not apply, and that proof of the habit is not necessary. It has not yet been declared what is meant by furniture, but the custom is such that it does not allow any one to think that anything used in the business of the hotel is within the reputed ownership of the hotel-keeper. I do not think that the transaction between the bankrupts and Coutts & Co. was within the definition of the 4th section. But that section is so worded that perverse ingenuity might argue that the transaction was within the 4th section, and therefore the express provision of the 10th section was inserted. I do think, however, that it was within the 10th section, and that it was a transfer of the bankrupt's interest.

LINDLEY, L.J.—Any one dealing with a hotel-keeper must, in my opinion, take his chance whether the furniture in the hotel belongs to him or not. As to the other point, I think there might be a difficulty about the transaction not coming within section 4, but it clearly comes within section 10. Section 4 uses the word "confer," and section 10 uses the word "transfer." This, I think, was not a transfer conferring title, but a sub-mortgage, or mortgage of a mortgage.

Appeal dismissed.

Solicitors—Linklaters, for trustee; Farrer & Co. for Coutts & Co.

[IN THE COURT OF APPEAL.]

BANKRUPTCY. 1884. Nov. 28. } *Ex parte* NEWITT; *in re* MANSEL.*

Bankruptcy—Liquidation—Removal of One of Two Trustees — Jurisdiction — "Cause shewn"—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 83.

Where more persons than one have been appointed to the office of trustee in a liquidation, the Court has power under s. 83, *sub-s.* 4, *of the Bankruptcy Act*, 1869, *to remove one of them without removing all.*

"Cause shewn" for the removal of a trustee within the meaning of the section does not necessarily amount to dishonesty; it is sufficient if the conduct of the trustee is, in the opinion of the Court, such as to render him unfit to remain a trustee, and on this point the Court of Appeal will, as a rule, trust to the discretion of the Registrar, he being in a better position to judge of the conduct of the trustee complained of.

This was an appeal from an order of Mr. Registrar Hazlitt removing Newitt from his office of trustee in the liquidation of Sir R. Mansel. The creditors in the liquidation had appointed Newitt and one Saffery to be trustees. The application to remove Newitt was made by Saffery, who complained that Newitt would not concur in an application to have certain moneys standing in the debtor's name at his bank transferred to the trustees; that he frustrated the sale of a yacht which the Court had ordered to be sold as part of the debtor's estate; that he refused to concur in the sale of the debtor's life interest in certain real estate; and, generally, that he deliberately and unfairly obstructed the due realisation of the estate, against the interest of the general body of creditors, in collusion with the debtor and his solicitor. The Registrar came to the conclusion that the charge of obstruction had been made out, and that Newitt was acting rather as the agent of the debtor than in the interest of the creditors, and under these circumstances he ordered his removal.

Against this order Newitt appealed.

* *Coram* Baggallay, L.J., Bowen, L.J., and Fry, L.J.

Cooper Willis, Q.C., and *Sidney Woolf*, for the appellant.—The Court has no jurisdiction under section 83 of the Bankruptcy Act, 1869, to remove one trustee without the other. By sub-section 1 it is provided that where the creditors appoint more persons than one to the office of trustee, the term "trustee" shall include all such persons; therefore, although the Court has jurisdiction under sub-section 4, upon cause shewn, to remove "any trustee," yet it cannot remove one alone of several persons who have been appointed to the office.

[BAGGALLAY, L.J.—Could not the Court remove all and re-appoint one?]

No. It is only the creditors who can appoint trustees.

[BAGGALLAY, L.J., referred to *Ex parte Oulton* (1), where, under the Bankruptcy Act of 1849, one of two assignees was removed on the application of his co-assignee.]

Bigham, Q.C., and *Kisch*, for the respondent, were not called upon.

BAGGALLAY, L.J.—The case is one of the simplest kind. There being two trustees, and a difference having arisen between them as to the administration of the estate, the Registrar has removed one of them. I think he was quite right in removing one; the only question could be which of them ought to go. The application was made by Mr. Saffery, who desired that there should be an immediate realisation of the debtor's assets. The Registrar came to the conclusion that, in regard to the sale of the yacht and of the debtor's life interest in some real estate, Mr. Newitt was acting in the interest of the debtor, in an interest antagonistic to that of the creditors, and that it was therefore undesirable that he should any longer remain a trustee.

This appears to have been the view of the Registrar, and it could hardly be right that under such circumstances both the trustees should remain. I do not understand the Registrar to imply that Mr. Newitt had been guilty of any dishonest conduct, but only that he was actuated by that which is not in itself a dishonourable motive—namely, a desire to do the best he could for the debtor. With regard to the yacht, I am of opinion that Mr. Newitt

(1) 3 Mont. D. & D. 536.

did his best to frustrate the order which the Court had made for its sale. In my opinion, the Registrar was perfectly justified in making the order upon the general grounds on which he professed to act. I go further, and say that if a variety of matters were brought before the Registrar, and he, acting to the best of his judgment, came to the conclusion that "cause" had been shewn for removing a trustee, I should not be disposed to overrule his decision. But in the present case I think he was quite right.

It is said, however, that the Registrar had no power under section 83 to remove one trustee unless he removed both. This argument is based on what is said to have been the old practice under the Bankruptcy Act 6 Geo. 4. c. 36, that when creditors had placed trust in two assignees in bankruptcy, you could not remove one of them without removing both.

But that that rule was not always acted upon is shewn by *Ex parte Oulton* (1), in which case the right of one of two assignees to apply to the Court to remove his co-assignee for misconduct was recognised. That case appears to me to be on all fours with the present case, and to shew that, independently of the provisions of the Act of 1869, one trustee might apply to the Court to remove his co-trustee on the ground of misconduct. But under section 83 of that Act, it seems to me clear that there is power to remove one of several trustees. Sub-section 4 says that the Court may remove "any trustee." It is said that those words mean one trustee if one alone has been appointed, but that they mean all the trustees if more than one has been appointed. I must confess that I cannot follow this argument. It seems to me that the words must include one trustee if there are several, and this view of the construction is confirmed by the other sub-sections. In my opinion this technical ground for the appeal fails.

BOWEN, L.J.—I am of the same opinion. The jurisdiction of the Court is based on or defined by sub-section 4 of section 83. I quite agree with the argument that the making of the order is not a pure exercise of discretion by the Registrar, for the removal must be "upon cause shewn": there must be "cause shewn" in order to found the jurisdiction. But still, although "cause" must be shewn, we must remember that the matter is one as to which the tribunal below has special means of judging, and we ought to trust considerably to the discretion of that tribunal. The Registrar has watched the proceedings in the bankruptcy throughout, and has far better means of judging of the conduct of the trustee than the Court of Appeal, which has simply paper materials before it. No doubt the Court of Appeal is bound to see that there was jurisdiction to make the order—that "cause" was shewn. But if the materials are capable of two reasonable interpretations, the Court of Appeal ought to recollect that the Court below has better means of judging which of the two interpretations is the more reasonable. In that sense we ought to trust to the discretion of the Judge below, though he cannot give himself jurisdiction if "cause" is not shewn. I think this was the view taken by the Court of Appeal in *Ex parte Sheard* (2). Was there then "cause shewn" for the removal of the trustee in the present case? I protest against its being said that "cause shewn" must be equivalent to dishonest conduct; I prefer not to attempt to define the meaning of the words "cause shewn." But there may be conduct shewing that it is no longer fit that a man should remain a trustee, though his conduct may fall far short of fraud or dishonesty. I do not for a moment suggest that Mr. Newitt has been acting dishonestly, or that he has been actuated by any but the best intentions. But there is a dead-lock between the two trustees. Is the business of the creditors to be suspended indefinitely? The Court must ascertain what the interest of the creditors requires, and if it sees that the dead-lock is caused by the vexatious conduct of one trustee, that it is his fault that the wheels will not run, it ought to remove him. I think that the vexatious conduct of Mr. Newitt has been due to some desire, no doubt in itself perfectly laudable, other than a desire to benefit the creditors. I am content to rest my judgment on his conduct with re-

(2) Law Rep. 16 Ch. D. 107.

gard to the sale of the yacht. He did not actually disobey the order of the Court, but he sailed as near to the wind as he could. I think the Registrar was right in removing him; at any rate he had good ground for thinking that he ought to do so. As to the argument that the Court cannot remove one trustee unless it removes them both, it is only necessary to look at the words of sub-section 4 of section 83, "the Court may, upon cause shewn, remove any trustee." It is said that these words mean "any trustee" if there is only one, and "any body of trustees" if there is a body of trustees. But the words are "any trustee," and why should they not have their natural meaning? It is said that sub-section 1 alters the meaning because it says that when more trustees than one are appointed "all such persons are in this Act included under the term 'trustee.'" But it is necessary to attend carefully to the language of the interpretation clause and ascertain what it really means. Here the clause says that the word "trustee" shall in addition to its natural meaning include something else. It does not, however, follow that because when there are several trustees they are all included under the word "trustee," each of them is not also included, especially in a clause the object of which is to facilitate the removal of trustees. That the construction which has been given to sub-section 4 by Lord Justice Baggallay is the correct one seems to me conclusively shewn by sub-sections 2 and 5, which would otherwise be unintelligible. The reason of the thing and the interpretation of the Act coincide, and the authority of *Ex parte Oulton* (1) confirms this view. I think there is nothing in the argument that the Registrar's order will prevent the calling of a general meeting of the creditors under sub-section 3.

FRY, L.J.—It is said that the power given to the Court by sub-section 4 of section 83 to remove "any trustee" does not enable the Court to remove one of two trustees. It is said that it would be unreasonable to give the Court jurisdiction to remove one trustee, when the creditors have committed the administration of their affairs to the discretion of two, and have trusted to their joint action. That objection appears to me to be answered by sub-section 2: the creditors will be called together in due course to exercise their discretion in appointing a new trustee. Then it is said that the word "trustee" has received an interpretation in sub-section 1, and that when there are several trustees it must be read as meaning all of them. This argument appears to me on the face of it untenable. Sub-section 1 does not say that the word "trustee" shall include, and shall include only, a body of trustees, but that it shall include a body of trustees. I will give an illustration of the absurdity of the argument that when an interpretation clause says that a certain expression shall include something, it means that it shall include the thing referred to and nothing else. In the year 1850, the Act 13 & 14 Vict. c. 21 was passed to regulate the interpretation of future Acts of Parliament, and it provided by section 4 that "in all Acts words importing the masculine gender shall be deemed and taken to include females." The result of the argument which has been addressed to us would be that in every Act which has been passed since 1850 the feminine gender is alone included. I am of opinion that cause has been shewn in the conduct of Mr. Newitt for his removal. I think the Registrar was quite right; but even if I had not entertained so strong an opinion, I agree that this Court must always pay great regard to the opinion of the Registrar upon a matter with which he is much more familiar than we are. The appeal will be dismissed with costs, but we do not interfere with the Registrar's order as to costs.

Solicitors—J. C. Stogdon, for appellant; Beyfus & Beyfus, for respondent.

1885. Feb. 5. *In re* AN ARBITRATION BETWEEN THE CHAPLAIN AND POOR OF WIGGESTON HOSPITAL AND STEPHENSON AND OTHERS.

Practice—Affidavits—Award—Power to extend Time—Irregularity—Order LII. rule 4—Order LXIV. rule 7—Order LXX. rule 1.

A notice of motion to set aside an award, which would expire on the last day of the sittings next after such award, was served without any copy of the affidavit in support of the application:—Held, *that though the Court may not have power to enlarge the time for making the application under Order LXIV. rule 7, there is power under Order LXX. rule 1 to hear the application, although the time has expired, if the Court deem fit.*

Hampden *v.* Wallis (Law Rep. 26 Ch. D. 746) *followed.*

This was a motion to set aside an award. Notice of motion was given, expiring on the 20th of December, 1884, the last day of the sittings next after the award had been given, but no copies of the affidavits in support of the application were served with such notice.

G. Sills (with him *Sir H. Giffard, Q.C.*), in opposition to the motion.—Order LII. rule 4 (1) requires the affidavits in support to be served with the notice of motion. The motion must be made "before the last day of the sittings next after such award has been made and published to the parties"—Order LXIV. rule 14 (2).

The Solicitor-General (*Sir Farrer Herschell, Q.C.*) (with him *R. S. Wright*).—The Court has power to enlarge the time—Order LXIV. rule 7.

[The Master brought to the attention of the Court a case of *Astle* v. *Dewaston* heard on the 20th of December, 1884, before Lord Coleridge, C.J., and Lopes, J., in which this objection was held to be fatal, as the Court could not enlarge the time.]

Even if the Court cannot enlarge the time, yet these proceedings are not void unless the Court so direct, as it is a mere non-compliance within Order LXX. rule 1 (3)—*Hampden* v. *Wallis* (4).

G. Sills, in reply.—Though the notice may not be void unless the Court so direct, yet the affidavits cannot be used.

GROVE, J.—I have considerable doubt whether we ought to hear this case, but on the whole I think we ought. In the case decided by Lord Chief Justice Coleridge and Mr. Justice Lopes, the application was for relief under Order LXIV. rule 7 (2), and it does not appear that Order LXX. rule 1 (3) was brought to their attention. The case of *Hampden* v. *Wallis* (4), on the other hand, was a decision on that rule, and to the effect that it is an irregularity which should be declared by the Court not to render the proceeding void.

MATHEW, J., concurred.

The Court then proceeded to hear the motion, which they refused, with costs.

Motion refused, with costs.

Solicitors—Sharpe, Parkers, Pritchard & Sharpe, agents for Peace & Ellis, Wigan, for the Suibston Colliery Co.; Collyer-Bristow & Co., agents for T. Ingram, Leicester, for the Chaplain &c. of the Hospital.

(1) Order LII. rule 4: "Every notice of motion to set aside, remit, or enforce an award, or for attachment, or to strike off the rolls, shall state in general terms the grounds of the application; and when any such motion is founded on evidence by affidavit a copy of any affidavit intended to be used shall be served with the notice of motion."

(2) Order LXIV. rule 7: "The Court or a Judge shall have power to enlarge or abridge the time appointed by these rules, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require; and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed." Rule 14: "An application to set aside an award may be made at any time before the last day of the sittings next after such award has been made and published to the parties."

(3) Order LXX. rule 1: "Non-compliance with any of these rules, or with any rule of practice for the time being in force, shall not render any proceedings void, unless the Court or a Judge shall so direct; but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court or Judge shall think fit."

(4) 54 Law J. Rep. Chanc. 83: Law Rep. 26 Ch. D. 746.

[IN THE HOUSE OF LORDS.]

1884. May 21, 23. } COOKSON AND ANOTHER v. SWIRE AND ANOTHER.

Bill of Sale—Registration—Renewal—Sale out and out under Power of Sale—Apparent Possession—Bills of Sale Acts, 1854, 1866, 1878 (*s.* 8), *and* 1882 (*s.* 3).

A bill of sale of household furniture was granted in 1873 *to the respondents and duly registered, but the registration was not renewed. The debtor remained in possession of the goods. In* 1883, *after an action had been commenced by the appellants against the debtor, the respondents, with a view to protecting the goods from seizure in execution, sold the goods to the debtor's son, who executed to them a new bill of sale as security for the purchase-money,* 250*l. This bill was registered under the Bills of Sale Act,* 1882. *The appellants obtained judgment against the debtor and levied execution on the goods, whereupon the respondents claimed the property, and the sheriff interpleaded. On the trial of an interpleader issue the jury found that the transactions between the respondents and the debtor's son were bona fide*:—Held, *that the Bills of Sale Acts,* 1878 *and* 1882, *never applied to the bill of sale of* 1873; *that under the Acts of* 1854 *and* 1866 *it was, though unregistered, valid as against the grantor; and that the exercise of the power of sale at a time when there was no execution creditor or other person entitled to the property as against the respondents put an end to the bill, and conferred an absolute title on the purchaser.* Held *therefore, that, whether or not the goods were in the apparent possession of the debtor at the time of the execution, the respondents had a good right to them as against the appellants.*

This was an appeal from a judgment of the Court of Appeal reversing one of Cave, J.

The sheriff of Lancashire, on the 26th of January, 1883, in execution of a judgment obtained the day before by the appellants, seized certain furniture of the judgment debtor Samuel Vaughan, in Croydon Villa, Blackpool, the house where Samuel Vaughan resided. The respondents claimed that the furniture was their property as against the appellants.

The sheriff interpleaded.

On the trial of an interpleader issue before Cave, J., with a jury, at Manchester, in April, 1883, the following facts were proved:—

On the 10th of May, 1873, the respondents paid debts of Samuel Vaughan, and took from him a bill of sale whereby the furniture was assigned to them as security for 698*l.* 10*s.* The bill of sale contained a proviso that if the grantor did not upon demand pay principal and interest, the grantees might take possession and sell by public auction or private contract upon such conditions and in such manner as they should think fit. The bill was duly registered, but the registration was never renewed.

On the 23rd of December, 1882, the appellants threatened to bring their action against Samuel Vaughan. Subsequently, at the end of December, 1882, Charles Vaughan (son of Samuel Vaughan) agreed with the landlord of Croydon Villa to become the tenant in the place of his father, who was paralysed and incapable. On the 8th of January the appellants commenced their action against Samuel Vaughan, and on the 11th the respondents served a demand for money due on the bill of sale and put a man in possession. A few days after it was agreed between Charles Vaughan and the respondent Samuel Swire (who was a brother-in-law of Samuel Vaughan), on behalf of the respondents, that Charles Vaughan should buy the furniture for 250*l.* No money was paid by Charles Vaughan, but a receipt was given him by Samuel Swire which was as follows:—

"250*l.* "Manchester,
"19th of January, 1883.

"Received from Mr. Charles Vaughan the sum of two hundred and fifty pounds, being the purchase-money agreed to be paid by him for the whole of the household furniture and effects now being in, about, or upon the messuage or dwelling-house situate and being Croydon Villa, South Shore, Blackpool, in the county of Lancaster.

"S. Swire,
"For self and co-mortgagees."

Charles Vaughan executed a bill of sale

dated the 19th of January, 1883, whereby he assigned the furniture to the respondents as security for the purchase-money. This bill was registered on the 22nd of January.

The jury found that the transactions between Charles Vaughan and the respondents were *bona fide*, and found a verdict for the respondents. Cave, J., reserved the case for further consideration, with liberty (by consent) to find any further facts that might be necessary.

On the 29th of May, 1883, Cave, J., adopting the view of the jury that the transactions were *bona fide*, found that the furniture was, on the 26th of January, 1883, in the apparent possession of Samuel Vaughan, and, holding that the bill of sale of 1873 was void under the Bills of Sale Acts previous to that of 1882 as against the execution creditors, he gave judgment upon that ground for the appellants.

The Court of Appeal on the 6th of November, 1883, reversed the judgment of Cave, J., upon the ground that the transaction between Charles Vaughan and the respondents being *bona fide* put an end to the bill of 1873, and the respondents' claim did not therefore depend upon its validity. They also found that the furniture was at the date of the execution in the actual and apparent possession of Charles Vaughan.

Sir F. Herschell (*Solicitor-General*) and *Charles, Q.C.*, for the appellants.—The respondents' title depended on the validity of the bill of sale of 1873. The transaction between them and Charles Vaughan could not be treated as a sale out and out under the power of sale, it must be regarded as a conveyance of their interest under the bill as in *Karet* v. *The Kosher Meat Supply Association* (1). But assuming first that the Act of 1882 does not apply, the bill, of sale was void against an execution creditor by reason of the registration not having been renewed; for the Court of Appeal were wrong in holding that the goods were not in the apparent possession of Samuel Vaughan—Bills of Sale Act of 1878, section 8; *Chapman* v. *Knight* (2). As to what constitutes apparent possession, see *Ex parte Jay* (3) and *Ex parte Lewis* (4). The receipt given to Charles Vaughan being part of the title ought to have been registered—*Marsden* v. *Meadows* (5). If a sale like this and a new bill of sale without any change in the possession are valid, the object of the Acts will be defeated.

Secondly, the Act of 1882 applied. That Act altered the law as laid down by the Court of Appeal in *Davis* v. *Goodman* (6), in which an unregistered bill of sale was upheld against the grantor under the Act of 1878. The Act of 1882, section 8, made unregistered bills void even against the grantor. By section 3 bills of sale registered under earlier Acts are excepted from the operation of the Act "so long as the registration thereof is not avoided by non-renewal or otherwise." The bill of sale here was not within the exception: consequently it was absolutely void, and no title could be given under it.

Ambrose, Q.C., and *C. H. M. Wharton*, for the respondents, were not called upon.

THE LORD CHANCELLOR (EARL OF SELBORNE).—It appears to me that the true point upon which this case depends is that which is clearly enough put in the judgment of the Master of the Rolls, although there is much in that judgment, with reference to the question of possession and apparent ownership, on which, if it were necessary for your Lordships to express an opinion, you might, subject to what you might have heard from the other side, perhaps have hesitated to agree with that learned Judge. But the Master of the Rolls says this: "At the moment when that transaction took place"—that is, between Mr. Swire and Mr. Charles Vaughan—"there was no execution creditor in existence. It is the person who has the legal property in the goods selling them by a *bona fide* sale to a person who has a right to buy them and does buy them; and it is an act equivalent to a carrying

(1) 46 Law J. Rep. Q.B. 548; Law Rep. 2 Q.B. D. 361.
(2) 49 Law J. Rep. C.P. 425; Law Rep. 5 C.P. D. 308.
(3) 43 Law J. Rep. Bankr. 122; Law Rep. 9 Chanc. 697.
(4) Law Rep. 6 Chanc. 626.
(5) 50 Law J. Rep. Q.B. 536; Law Rep 7 Q.B. D. 80.
(6) 49 Law J. Rep. C.P. 344; Law Rep. 5 C.P. D. 128.

over by one to the other. I come to the conclusion on that that the bill of sale was satisfied"—by which I understand the learned Judge to mean spent, and at an end, *functum officio*—"at a time when the Bills of Sale Act did not apply to it; and from that time the Bills of Sale Act never applied to that bill of sale any more, so that the question of apparent ownership with regard to the bill of sale was not one which arose at that time." If that is a correct view, I apprehend that there can be no doubt that the judgment of the Court of Appeal is correct; though some other reasons have been assigned for it, as to which, if the case had depended upon them, your Lordships would doubtless have desired to hear the respondents' counsel. And I think that that view is correct.

Now the facts necessary to be considered are few. This bill of sale was given upon the 10th of May, 1873, and undoubtedly, according to the law as it stood at that time under the Acts of 1854 and 1866, it was necessary that the bill of sale should be registered to make it stand against assignees in bankruptcy and execution creditors of the grantor of the bill of sale; and it was also necessary that, to keep the registration on foot, it should be re-registered at the end of five years. In point of fact it was originally registered, but at the end of five years it was not re-registered, and for the purposes of the present argument it must be taken as an unregistered bill of sale. Still, it was a bill of sale governed by the Acts of 1854 and 1866; and, for the reasons which I shall presently give, it was not governed, for any purpose material to this case, either by the Act of 1878 or by the Act of 1882.

This being the state of the case, and the bill of sale having been given to secure the payment of a certain sum of money on demand, with a power of sale in the most ample terms in the case of non-payment, it appears that a demand was made of the money by the creditor on the 11th of January, 1883. And I take it to be clear and unquestionable that at that time, as between the debtor and the creditor, the bill of sale was in force; though, not being registered, if an execution had before that time been issued, the right of the execution creditor would have prevailed. But, as between the debtor and the creditor, it was in force according to its tenor, and with all its provisions. The demand was duly made upon the 11th of January, 1883, and that demand, being in writing, expressly stated that if the payment were not made, the holders of the bill of sale (I will call them mortgagees, for that was the nature of the security) "will proceed to sell your furniture and effects under the powers contained in such bill of sale"—which, as I have said, were ample powers of sale, and if duly exercised would convey to a purchaser, not the title to the mortgage originally created by the bill of sale, but as full a title as any absolute transfer could give.

The money was not paid, and on the 19th of January the transaction was completed as between the vendors and the purchaser, Mr. Charles Vaughan, in this way: the goods were delivered in a manner which, as between those parties at all events, I take to have been perfectly sufficient to transfer the possession. A receipt was given for the purchase-money, which is in these terms: "Received from Mr. Charles Vaughan the sum of 250*l.*, being the purchase-money agreed to be paid by him for the whole of the household furniture and effects." That is signed by the vendor; and on the same day a security for that money, which was accepted in lieu of payment, was given by Mr. Charles Vaughan, as the purchaser and the owner of the goods sold, to Mr. Swire and the other vendors, which security was duly registered according to the requirements of the Acts of Parliament and the Bills of Sale Act, so far as related to that transaction at all events, on the 22nd of January, three days afterwards, at which time there was no bankruptcy and no execution. The execution creditors, who are the appellants here, obtained judgment as against Samuel Vaughan, the grantor of the original bill of sale, on the 25th of January, 1883 and execution was immediately afterwards issued; but that was subsequent, not only to the completion of such title as Charles Vaughan derived from the sale to him by the persons who had derived title from the original bill of sale of 1873, but also subsequent to the registration of the new se-

curity by the new bill of sale which Charles Vaughan, as owner, had given to Messrs. Swire: so that if Charles Vaughan had a title which enabled him to give that security, that security was duly registered, and the execution could not prevail over it.

These are the material facts. Now let us consider the questions of law which have been argued.

And, first, I think that it may be well to deal with the question by what law the case is to be governed. The Acts which were in force when this bill of sale was originally given were the Acts of 1854 and 1866; and it appears to me to be clear that the subsequent Acts have no bearing at all upon the case, because the Act of 1878 is, by the 3rd section, expressly made applicable only—when I say "only," I mean as to its general provisions, including the important provision of the 8th section, which avoids bills of sale against execution creditors—it is made applicable, in that sense, only to every bill of sale executed on or after the 1st of January, 1879. This bill of sale, as has been said, was executed in 1873. It is not, therefore, a bill of sale to which the Act applies under that clause. And by a later section, the 23rd, this is added:—"From and after the commencement of this Act, the Bills of Sale Act, 1854, and the Bills of Sale Act, 1866, shall be repealed; provided that (except as is herein expressly mentioned with respect to construction)"—which is immaterial for this purpose—"and with respect to renewal and registration"—which is also immaterial for this purpose, for this was an unregistered bill and could not then be renewed — "nothing in this Act shall affect any bill of sale executed before the commencement of this Act; and as regards bills of sale so executed the Acts hereby repealed shall continue in force."

The Act of 1878 leaves untouched bills of sale under the former Acts, and leaves them still to be governed by those former Acts, except with regard to two matters which for this purpose are immaterial, and the new Bills of Sale Act only applies as to its general provisions to bills of sale executed after the 1st of January, 1879, which this was not. That Act, therefore, I think, cannot apply in any way to this case.

But then it was contended that there were words in the 3rd section of the Act of 1882 which made that Act applicable to the present bill of sale, because it had been previously avoided by non-renewal. I think that several answers might be given to that observation. It is, no doubt, a singular way of making the positive provisions of an Act of Parliament applicable retrospectively to past transactions, if it is alleged to be done merely by negative words which exclude the application of the Act to certain classes of cases within which the matter in question may not happen to come; and when we look at the affirmative provisions of the Act it seems excessively difficult to give them, at all events in such a case as this, any retrospective operation. But I am content for this purpose to lay aside the Act of 1882 upon this simple ground, that the 3rd section, which contains the words which are relied on, says: "The Bills of Sale Act, 1878, is hereinafter referred to as 'the principal Act,' and this Act shall, so far as is consistent with the tenor thereof, be construed as one with the principal Act." Then are added the words which are relied upon: "but, unless the context otherwise requires, shall not apply to any bill of sale duly registered before the commencement of this Act so long as the registration thereof is not avoided by non-renewal or otherwise."

Well, it appears to me that whatever the effect of those words "but unless," and what follows, may be as to bills of sale which are within the principal Act, the registration of which may be avoided by non-renewal, they cannot possibly have the effect of extending the provisions of the Act of 1882 to old bills of sale which are neither by any clear and express words brought retrospectively within the Act of 1882, nor are within the Act of 1878; and I have already shewn that this bill of sale is not within the principal Act, the Act of 1878.

That brings us back, therefore, purely and simply to the question, What is the effect of the Act of 1854? In that Act there are only two sections which are at all material to be referred to—and, in my judgment, only one, which is the 1st. Another has been referred to in the argument as perhaps bearing upon the question—

namely, the 7th, containing the definition of apparent possession. But what is this 1st section of the Act of 1854? Read shortly it is this, that every bill of sale of personal chattels shall, as against assignees in bankruptcy, and as against execution creditors, be null and void so far as regards the property in or right to the possession of any personal chattels comprised in such bill of sale which at the time of the bankruptcy, or of executing the process, as the case may be, and after the expiration of a period of twenty-one days, shall be in the possession, or apparent possession, of the person making such bill of sale, or of any person against whom the process shall have issued, under or in the execution of which such bill of sale shall have been made or given, as the case may be. It is argued that those words, according to their true and proper meaning, overreach all intermediate transactions whatever, changing the title to the property between the original unregistered bill of sale and the execution if at the time of the execution the property is "in the possession, or apparent possession, of the person making the bill of sale, or of any person against whom the process shall have issued, under or in the execution of which such bill of sale shall have been made or given." I am not quite sure that I entirely grasp the effect of that latter alternative, and perhaps it would be better to say nothing about it; but the argument is, as I have said, that, at all events, if the goods are in the possession, or apparent possession, of the person who made the bill of sale—no matter what time may have elapsed: no matter what intermediate transactions may have taken place, *bona fide* as well as otherwise: no matter what alteration in the title to the goods and chattels may have been effected by those intermediate transactions—still you have only two things to look at—the original bill of sale, and the final execution and the state of possession at that time. "Apparent possession" is defined, but it appears to me that there is nothing in the definition having any other bearing on the language of this clause, except to shew that formal possession is not to exclude the operation of this 1st section in favour of an execution creditor.

I think that it might perhaps be enough to look at the words "comprised in such bill of sale," and the words that the bill of sale shall "be null and void." It is impossible that those words can have been meant by the Legislature to apply to a case in which the existing title does not depend upon the bill of sale, and in which the goods are not, for any present purpose, comprised in the bill of sale at all. They have passed out of that condition. They have passed into the hands of a subsequent purchaser, who takes a title not dependent upon the continued subsistence or efficacy of the bill of sale at all; and he takes it at a time when there is no execution and no bankruptcy in respect of which the title of the person selling to him was liable to be impeached.

It seems to me, therefore, that it is quite impossible to say that a spent transaction of that kind—for that bill of sale is as entirely spent as if it had been null and void to all intents and purposes, independently of the Act—can be revived, as it were, for the purpose of being destroyed, to let in, as against the true title, a subsequent execution creditor. It is not sufficient to say that the same thing might have happened if it had been an absolute transfer by bill of sale. I assume that it might have been, and I agree that the argument probably would have been the same. If the subsequent transferee in that case, as in this case, leaves the goods in the apparent possession of the person who is the grantor of the original bill of sale, and himself does not register his own title; if his title is by an absolute bill of sale, or if he grants a title to somebody else, whether absolute or conditional; and if that person does not register it, then he in the one case, and his assignee in the other, will be liable, no doubt, to have his title defeated by a subsequent execution, not because the person to whom the first bill of sale was given has not registered it, but because the person who has got the second bill of sale has not registered it, and leaves it in a position of danger. I do not think, therefore, that that varies the matters in any degree whatever; but I do think that, as against the true owner, you must find in the Acts something which takes away his right. Now there is nothing

in these Acts which gives to any execution creditor any right to seize property because it is in the apparent possession of his debtor, though it does not really belong to him, unless the title of the true owner depends upon a bill of sale not registered. All the other conditions of apparent possession, and an ownership different from that of the apparent owner, may exist, but there is nothing whatever in this Act of Parliament, at all events, which gives an execution creditor the right on that account to take property which does not belong to his debtor. If, therefore, the right is claimed, it can only be claimed upon the strict conditions of this Act; and it must be, because at the time when the execution takes place there is a bill of sale governing the title to that particular property in which, in that sense, the goods in question are comprised, and because, if that bill of sale were at that moment null and void, the title would be destroyed by its nullification. But that is not the state of the case here. Here the title had passed away from the bill of sale altogether. There had been an out-and-out sale—*bona fide*, as the jury found—to an absolute owner who no longer held by virtue of that bill of sale at all, but held by virtue of a sale which had been made to him; and then he, *uno flatu*, makes an assignment to another person, and that other person has duly registered the bill of sale under which he claims.

I think, under these circumstances, the judgment appealed from is right, and ought to be affirmed.

Lord Blackburn.—I am of the same opinion. I think that in the judgment of Mr. Justice Cave there is only one point (but that is a very important point) on which I am inclined to differ from him. The Court of Appeal, I think, indicate what, in my mind, is the true ground upon which Mr. Justice Cave was wrong; but they also indicate a good many other things upon which, as the Lord Chancellor has said, if it were necessary to decide upon them, I should certainly at least require to hear the other side in support of them. I need not say more than that. It all turns, in my mind, upon the construction of a few words in an Act of Parliament; but I will first of all point out what I think is the real object of these Acts of Parliament before coming to the interpretation of the words. At common law a man might take a security upon goods without carrying away the goods or taking possession of them. Probably he could not have taken a pledge or pawn at common law, but he might have taken a sale of them out and out, and he might have taken the legal property in them, subject to the power to redeem them (what is commonly called a mortgage), without taking possession of them. I believe he might have done that at common law, and that he might have done it without any writing before the Statute of Frauds. All the law on the subject will be found in *Twyne's Case* (7) and the notes upon *Twyne's Case* (7); but this rule got established, that when the goods were not taken away, but were left in the hands of the man who had had them previously, that which had been thought before to make the transaction void was really no more than evidence of fraud—it was evidence to go to the jury, a badge of fraud; and if a man came forward suddenly—when there was an execution, for instance, issued against the person in possession of the goods—and said, "At an antecedent time I had a security upon these goods, and I left them in the possession of the debtor all that time," the not having taken possession was evidence that the thing was a sham—it was not conclusive, it was not a matter of law; but it was evidence that the thing was a sham. Upon that two evils arose, and very important ones they were. In the first place, it often happened that there was really a sham put up to endeavour to defeat a man, and there was a great quantity of perjury, of fighting and expense, before it was proved to be a sham. That was a great evil. The other was that there were real honest transactions which were asserted to be shams when they were not, and in those cases there was apt to be much perjury and great expense before it was decided. For those reasons it was thought—and reasonably and properly so—that it was desirable to put a stop to this.

That was the beginning of the series of Bills of Sale Acts, the first of which was passed in 1854, and said this: Where

(7) 3 Rep. 80; 1 Sm. L.C. (8th ed.) p. 1.

there is a bill of sale, or where there is a written agreement, in which it appears that you have got a security, or even, I suppose, a transfer of the whole property—at all events, that you have got a security, a bill of sale—that shall, within a short time, be registered, and two things are to follow from it. In the first place, its being registered will put an end to any fear that any one should start forwards afterwards and say, "The transaction being kept secret is a proof that it was a sham transaction"—for, it being actually registered, as bills of sales were required to be, it could no longer be secret, and there would be no badge of fraud in that respect. The other was, if it be not registered, then, so long as the goods are in the apparent possession of the person to whom they originally belonged, so long it shall be void as against a certain class of persons—namely, execution creditors, and various other persons that were named. The only thing that I would say at the outset upon this with regard to the 1st section is that the first Bills of Sale Act applied not only to sales and transfers by the grantor (the man who had the goods) by way of security and otherwise, but also to transfers by the sheriff when he had seized these goods. Nobody for a moment would suppose that it was a possible thing, when the sheriff had seized the goods and sold them, that the sheriff should make out a bill of sale, and that the sheriff should keep possession—that was out of the question. But it was thought—and, indeed, it was found by experience—that a very common mode in which a sham actually took place, when there was an execution, was this, that the execution debtor bought back his own goods, getting a man of straw to come forward and pretend this: "It is I who have bought them from the sheriff, and although I have lent money to you, and you have given me security, and I let you have the goods, still it is I who buy them from the sheriff." Consequently the Act of Parliament very judiciously said bills of sale shall be registered as well when they are given by the man himself as when the sheriff has taken them in execution from him. And that is what I was alluding to when I asked the Solicitor-General a question on the subject in the course of the argument. I could not remember the words, but they occur in a line and a half of the 1st section of the Act of 1854; but nothing of that sort applies here, nothing arises here about it, for no sheriff had anything to do with this matter.

Now, coming to apply this Act to the present case, we find that in 1873 the Rev. Samuel Vaughan was in debt. It appears from a bill of sale which is in evidence here that he was in debt to a bank, I think, and there was a considerable sum of money which he had got advanced to him, and there were some costs which had to be paid. Mr. Swire, who seems to have been his brother-in-law, and also trustee, I suppose, for Mrs. Vaughan—we do not really know about it, he was a friend and brother-in-law, at all events—did agree to advance money to pay off that debt; and for that purpose—it was a very proper thing to do—he said: I will take the goods from you; I will take a security, if you like, upon all those goods—and if you pay off that security, well and good; if not, it is evident that the intention of Mr. Swire was that these goods should be a security to him for the money which he had advanced—whether out of his own pocket, or as trustee for his sister, we really do not know, and it is not material; he intended that these goods should be a security for that advance, and it was obviously the intention that they should remain in the Rev. Samuel Vaughan's house and be used by the Rev. Samuel Vaughan and his family—in fact, be, to all intents and purposes, in the apparent ownership of the Rev. Samuel Vaughan. That bill of sale, as was necessary under the Bills of Sale Act which then existed (this was in 1873), was registered, and it would therefore at the end of five years require to be re-registered, or otherwise it would have the same effect as if it had never been registered, and would consequently be void as against the class of persons who were named in the Acts existing at that time. I do not know that it is very material to say anything further about it than that.

This security, which was taken by Mr. Swire in 1873, contained at the end a provision which, I think, has been read more than once:—"Provided also, and it is hereby declared and agreed, that if the

said mortgagor"—that is to say, if Mr. Vaughan did not pay the money owed when a demand had been made in writing within seven days, then it should be in the power of Mr. Swire or his assigns to sell the goods absolutely by private bargain. That was the provision that was inserted.

Now it happened that at the time when this transaction took place it became known to people that there was a creditor who was likely to come upon the Rev. Samuel Vaughan and to seize his goods—or rather not his goods, but the goods which were in his apparent possession as it was said; and people also became aware that owing to the neglect—I know not of whom—however, the *de facto* neglect to re-register the bill of sale, inasmuch as the term of five years had elapsed in 1878, that bill of sale had become an unregistered bill of sale, and was consequently void as against those against whom unregistered bills of sale were made void, though not, under the law as it then stood, void as against anybody else. That being so, there is no doubt in my mind that formal notice to Mr. Vaughan to pay off the money was given, in order that at the end of seven days Mr. Swire should be in a position legally to sell the goods. I have no doubt whatever that that was done, and there is no doubt whatever in my own mind that that was done for the very purpose and object that by selling those goods they should be able to defeat the creditor who would come against the Rev. Samuel Vaughan and would seize those goods which really and truly belonged to Mr. Swire—at least for all substantial purposes they belonged to him, because I suppose they were mortgaged to their full value—but which had been left, as I have described, in the possession of the Rev. Samuel Vaughan. There is nothing whatever illegal, there is nothing immoral, there is nothing improper in that. It is conceded that it would have been perfectly good when that notice had been given if Mr. Swire, acting in his own interests, had come with porters and taken the goods and carried them out of the house, although that had been done only two minutes before the sheriff's officer had turned the corner of the street to come and seize them all; it would have been perfectly legal and right to do that instead of determining to take the goods out of the apparent ownership of the Rev. Samuel Vaughan in the way it was done. I agree, for my own part, I make no doubt at all, that it was really and entirely with that object that—Mr. Charles Vaughan, the son of the Rev. Samuel Vaughan, not, I dare say, having much money of his own, probably no immediate money—Mr. Swire, advised I suppose by lawyers that this was the best course to pursue, said, "I will sell them to you, Charles, as soon as I have got the right to do it. You cannot pay me, I know, you have not got the money, but I will lend you the money. I agree to sell the goods to you and transfer the goods to you, and when they are transferred to you I will lend you the money if you will then give me a new bill of sale upon the goods so as to make them a security for the money I lend you." I have no doubt that that which was done in that way was intended to be done for the very purpose of defeating an execution undoubtedly, and of keeping these goods unsold for the benefit of the dying father, the Rev. Samuel Vaughan, and the mother, I suppose, if she is still alive, and the children. So far from thinking that was wrong or immoral, I think myself that it was highly moral and right. It would have been very wrong and very improper to pretend to do all this, no doubt; but so far from its being wrong or improper to do it, I think it was, as I say, highly moral and right. The question as to whether or no it was a sham, the question whether or no there was really a *bona fide* transaction to the effect which I have described, was left to the jury, and their finding is unimpeached.

Then comes the question of law. Now, says Mr. Justice Cave, "they prove an agreement between Charles Vaughan and Mr. Swire, by which the property in the goods was transferred from Mr. Swire to Charles Vaughan." Now, had that been so, as at present advised, I should say, subject to what might be said by the other side if it was necessary to hear them, that there was an apparent ownership in Samuel Vaughan at that time, and I should have said that if Mr. Swire had agreed to transfer the property from himself to Charles Vaughan, Charles Vaughan would be in the same

position and no better than Mr. Swire. But instead of thinking that it was an agreement to do that, I think it was intended to be, and was, an agreement, not that Mr. Swire would transfer his own rights, after having given the due notice by which he was enabled either, as I said before, to come with porters and carry away the goods and so put an end to the matter, or to sell the property out and out of the Rev. Samuel Vaughan in those goods; it was not an agreement that he would transfer his own right, but that he would transfer the absolute property in the goods. What Mr. Swire had was the goods subject to an equity of redemption; what he conferred upon Charles Vaughan was very likely not of more value, but it was a different thing. It was the property in the goods without any equity of redemption, and if the transaction was a *bona fide* one (and I do not myself see the slightest ground, when it has been explained as I have explained it, for saying it was not perfectly *bona fide*), I do not see how it comes within the earlier Act. The earlier Act makes the unregistered bill of sale void as against those issuing process against the maker of the bill; but it does not, when a title is acquired under the bill of sale *bona fide*, before there was any one who had the right to avoid the bill of sale, make that title void in favour of a person whose right to avoid the bill of sale came into existence afterwards; and that, in the present case, was not until the time of the execution, when the sheriff's officer came in. It seems to me, therefore, that upon that ground I should say that Mr. Justice Cave made a mistake and was under a misapprehension upon that point. Upon the rest I should be inclined to agree with him. We have not heard the counsel for the respondents, and it may be that on some of the other points the Court of Appeal may be right. I will not say that they are not, but upon that ground I think that this was not a case in which, under the Acts which had been passed down to 1878 (I do not go further than that), it would have been void as against any one else. It is said that the Act of 1882 has the effect of making it void absolutely, or to a greater extent. It may be that in other cases it may be seen to be so as regards later bills of sale, but as far as the present case is concerned, for reasons which I do not repeat, as they have been stated by the Lord Chancellor, and which are satisfactory to my mind, I think that, if the Act of 1882 has the effect of making future bills of sale void in that way, it was not intended to be retrospective so as to bring it into operation in the present case and apply it to a bill of sale which was not re-registered at the time when it ought to have been, that bill of sale itself having been made before the Act of 1878 came into operation, and, of course, long before the passing of the Act of 1882. For those reasons I agree in the judgment which has been proposed.

LORD WATSON and LORD FITZGERALD concurred.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitors—Johnson & Weatherall, agents for Storer & Lloyd, Manchester, for appellants; Pritchard, Englefield & Co., agents for Southam & Harwood, Manchester, for respondents.

[IN THE COURT OF APPEAL.]

1884. Dec. 9, 10. } THE QUEEN *v.* SIBLY.

Poor — Rate — Overseers — Opposing Private Bill in Parliament — Reasonable and Moderate Expenses — Allowance by Auditor.

[For the report of the above case, see 54 Law J. Rep. M.C. 23.]

[IN THE COURT OF APPEAL.]

1885. Jan. 13, 14, 16. } YATES, *plaintiff in error.* THE QUEEN, *defendant in error.**

Criminal Law—Libel—Criminal Information—Newspaper Libel and Registration Act, 1881 (44 & 45 *Vict. c.* 60), *s.* 3—*Fiat of Director of Public Prosecutions.*

Section 3 *of the Newspaper Libel and Registration Act*, 1881, *which enacts that "No criminal prosecution shall be commenced against any proprietor, publisher, editor, or any person responsible for the publication of a newspaper, for any libel published therein, without the written fiat or allowance of the Director of Public Prosecutions in England, or Her Majesty's Attorney-General in Ireland, being first had and obtained," does not apply to criminal informations for libel.*

Writ of error upon a judgment of the Queen's Bench Division upon a criminal information for libel.

A criminal information was at the instance of the Earl of Lonsdale filed against the plaintiff in error in respect of a libellous article published in a newspaper of which he was the proprietor. A rule *nisi* was then obtained to shew cause why the information should not be quashed on the ground that the fiat of the Director of Public Prosecutions had not been obtained in accordance with section 3 of the Newspaper Libel and Registration Act, 1881 (1). The majority of the Court discharged the rule, being of opinion that the section did not apply to criminal informations. This decision, which involved the same question as that raised on the writ of error, is reported 52 Law J. Rep. Q.B. 778.

Ultimately judgment was given whereby the defendant to the information was sentenced to four months' imprisonment as a misdemeanant of the first division. Thereupon he brought error on the record on the ground that he could not have been proceeded against by the information in question without the written fiat or allowance of the Director of Public Prosecutions having been first obtained in accordance with section 3 of the Newspaper Libel and Registration Act, 1881.

C. Russell, Q.C., and *Box* (with them *Poland*), for the plaintiff in error.—This Act includes criminal informations, which in the legislation on the subject have always been placed in the same category with indictments. Thus Fox's Libel Act (32 Geo. 3. c. 60) includes criminal informations. Similarly, 60 Geo. 3 and 1 Geo. 4. c. 8 (the Act against Seditious Libels), the Parliamentary Papers Publication Act (3 & 4 Vict. c. 9), and Lord Campbell's Libel Act (6 & 7 Vict. c. 96) applied to criminal informations as well as to indictments. These Acts did not use the words "criminal prosecution"; but if those words do not include criminal informations, this Act is the first of the series which excludes them. If a criminal information is not a "criminal prosecution," what is it? In *Hawkins's Pleas of the Crown* (vol. ii. c. 26. s. 4), it is laid down that criminal informations differ from indictments in little else except that they are not found by a grand jury. So also in *Corner's Crown Practice* (p. 168), *Chitty's Criminal Law* (vol. i. p. 842), and *Blackstone's Commentaries by Coleridge* (vol. iv. p. 310). It is not necessary to contend that the section applies to *ex officio* informations for libel, but it has been usual to include even *ex officio* informations in statutes *in pari materia*. The words "criminal prosecution" occur in only two places in the Act—in the preamble, and in this section. In the preamble it is recited, "Whereas it is expedient to amend the law affecting civil actions and criminal prosecutions"—thus dividing the whole subject in half. The word is used in the same comprehensive sense in section 3. That the word "prosecution" is rightly applied to informations is shewn by 4 & 5 Will. & M. c. 18, 60 Geo. 3 and 1 Geo. 4. c. 4, and 6 & 7 Vict. c. 96. The prosecution by information commences so soon as a

* *Coram* Brett, M.R., Cotton, L.J., and Lindley, L.J.

(1) 44 & 45 Vict. c. 60. s. 3: "No criminal prosecution shall be commenced against any proprietor, publisher, editor, or any person responsible for the publication of a newspaper, for any libel published therein, without the written fiat or allowance of the Director of Public Prosecutions in England, or Her Majesty's Attorney-General in Ireland, being first had and obtained."

motion is made for a rule *nisi* to file a criminal information. It was held in *Clarke* v. *Postan* (2) that the prosecution in an action for malicious prosecution began with the information.

Section 3 may be construed so as to work with the Vexatious Indictments Act, which applies to indictments only. The prosecution by information commences with the application for the rule *nisi*, which is analogous to the application to a magistrate for a warrant or summons. Therefore the suggested difficulty, that the Director could overrule the decision of the Queen's Bench Division, disappears. The words "criminal prosecution" are always understood to include prosecutions by criminal information. The words of the section are clear, and should be construed in their natural sense, the consequences of the construction being left to the Legislature to remedy.

The cases of *The Queen* v. *Steele* (3) and *The Queen* v. *Fletcher* (4) were also referred to.

The Attorney-General (*Sir H. James, Q.C.*), and *Danckwerts*, for the defendant in error. — Assuming that the words "criminal prosecution" can include criminal information, still general words are only to be applied to that to which they can be reasonably applied, and if absurdity will be caused by their being applied to a particular matter, the general words should be limited so as to exclude it and prevent the absurdity. Examples of such a construction are to be found in the following cases—*Stradling* v. *Morgan* (5), *Eyston* v. *Studd* (6), *Heydon's Case* (7), *Wigan* v. *Fowler* (8), and *Harding* v. *Preece* (9). Applying those principles to section 3, it cannot be contended that the words apply to criminal informations *ex officio* by the Attorney-General. It would be absurd to say that in Ireland, where there is no Director of Public Prosecutions, the Attorney-General is to give leave to himself. Nor could it be said that in England the Attorney-General was to ask leave from the Director to file an information on behalf of the Crown. Therefore it must be admitted that there must be some limitation, and the only question is as to the degree of limitation.

The commencement of the prosecution is when the information is filed—that is, after the rule is made absolute. Before 4 & 5 Will. & M. c. 18, the information was the commencement, for there was nothing previous to it. The rule *nisi* or absolute required by that Act was mere matter of procedure—see *The King* v. *Robinson* in the note to *King q.t.* v. *Cole* (10). As to the analogy under the Church Discipline Act, see *Ditcher* v. *Denison* (11); and of a *capias* under an information in the Exchequer, see *The Attorney-General* v. *Brown* (12). As to the analogy of proceedings before magistrates, the case of *Clarke* v. *Postan* (2) does not shew that the information was the commencement of the prosecution.

The evil to be remedied by section 3 of the Act of 1881 was that persons could formerly go before magistrates and put newspaper proprietors to trouble and annoyance. But informations required the leave of the Court, which would only exercise its jurisdiction for the public good —1 *Hawk. P.C.* (c. 28. s. 3), *Black. Com.* (vol. iv. p. 309), and *The Queen* v. *Labouchere* (13). In the case of criminal informations the evil does not exist.

If the fiat is necessary before the application to the Court, the Court will not be permitted to exercise its jurisdiction, which will, therefore, be ousted; but that cannot be done without clear words—see *Bac. Abr.*, tit. "Court of King's Bench," A., *Thatcher* v. *Waller* (14), *Smith* v. *The Commissioners of Sewers* (15), and *The King* v. *Morley* (16). As to the construction of section 2,

(2) 6 Car. & P. 423.
(3) 46 Law J. Rep. M.C. 1; Law Rep. 2 Q.B. D. 37.
(4) 46 Law J. Rep. M.C. 4; Law Rep. 2 Q.B. D. 43.
(5) Plow. 199, 203.
(6) Plow. 459, 465.
(7) 3 Rep. 7.
(8) 1 Stark. 459.
(9) 51 Law J. Rep. Q.B. 515; Law Rep. 9 Q.B. D., at p. 297.
(10) 6 Term Rep. 640.
(11) 11 Moore P.C. 324.
(12) Forrest, 110.
(13) 53 Law J. Rep. Q.B. 362; Law Rep. 12 Q.B. D. 320.
(14) T. Jones, 53.
(15) 1 Mod. 44.
(16) 2 Burr. 1010.

the term there is "criminal proceeding," which is far larger than "criminal prosecution." In section 3 the words "criminal prosecution," even if they popularly include criminal information, which is doubtful, are so general as to admit of limitation. As to section 6, there are cases of prosecution by indictment which, although not met by the Vexatious Indictments Act, are met by section 3.

Russell, Q.C., replied.

Cur. adv. vult.

The following judgments were delivered on Jan. 16:—

BRETT, M.R.—In this case a criminal information for a newspaper libel was exhibited at the instance of a private prosecutor against the defendant, with the result that the defendant was found guilty. Upon that the case comes before us upon a writ of error, and we have no jurisdiction except as upon such a writ, inasmuch as the case is a criminal case. For the error on the record, we must look to the information itself. The objection of the plaintiff in error comes to this; that to obtain the leave of the Public Prosecutor was a condition precedent to the jurisdiction of the Court, and not merely a regulation which might or might not be waived. He must go to the extent of saying that this is a condition precedent to the jurisdiction of the Court; that it is necessary to aver jurisdiction, and that that averment is wanting. The first thing to determine is, whether under the statute in question it is a condition in any sense that the fiat of the Director of Public Prosecutions should be obtained—that is, whether section 3 of the Act of 1881 applies to criminal informations for newspaper libels at the suit of private prosecutors. If it does, then at some time or other it would seem that the fiat must be obtained. But if it does not, then no objection can be urged to this information. It was contended on behalf of the plaintiff in error that section 3 does apply to criminal informations for newspaper libels at the suit of private prosecutors; and the first point was that section 2 clearly so applies; and, if so, the first recital in the preamble of the Act must also so apply, and then the phrase "criminal prosecutions" also applies to them, in which case the same interpretation must be given to the same phrase in section 3. That section 2 does apply to criminal informations, I do not doubt in the least; but I do not think that it necessarily follows that the phrase "criminal prosecutions" in the preamble applies to criminal informations. The only argument which can be urged to the contrary is that section 2 cannot go beyond the preamble. The phrase in section 2 is not "criminal prosecution," but "proceeding," which is a far larger term. I have no doubt that a proceeding against a defendant for libel by means of information is a "criminal proceeding." But it does not follow from that that the words of the preamble are as large as section 2, for it is well known that a positive enactment can go beyond a preamble. Whatever may be the meaning of the preamble, it is clear that section 6 goes beyond it, for it extends to all libels, whereas the preamble refers only to newspaper libels. Therefore it may be that section 2 also goes beyond the preamble; and therefore the application of section 2, which uses a different term from that in the preamble, does not assist us in construing the phrase "criminal prosecution" in the preamble. I agree that, whatever is the meaning of the phrase in the preamble, it is contrary to every canon of construction to say that when the same phrase occurs in the section a different construction can be given to it. The question is reduced to the same thing—namely, what does it mean in one or both places.

The next argument was that in Acts of Parliament *in pari materia* informations and indictments have always been dealt with together, and that the Act now in question would be the first in which they were separated. Several Acts of Parliament have been cited, of which the first is 32 Geo. 3. c. 60. But distinct phraseology is there used to distinguish indictment from information. The Act speaks of the trial of "an indictment"—which is by bill—"or information." Then the next statute, 60 Geo. 3 and 1 Geo. 4. c. 8, does not contain either of the phrases, and therefore does not assist us. Then as to 3 & 4 Vict. c. 9, the phraseology used is "civil or criminal proceeding"; the term

"criminal prosecution" not being used. Therefore the term "criminal proceeding" has the same larger interpretation as in section 2 of the Act of 1881, but does not lead us to the meaning of "criminal prosecution" in section 3. Lord Campbell's Act, 6 & 7 Vict. c. 96, speaks of "any indictment or information"; so there when both classes are to be brought into one enactment, distinctive phrases are used which describe both. It seems to me that, so far from being able to say that on looking at Acts of Parliament *in pari materia* it can be seen that the phrase "criminal prosecution" has been applied to prosecutions by way of indictment or information, they tend to the contrary, for they shew that when Parliament desires to deal with both indictment and information, either words are used which must comprise both, or distinctive phraseology is used. It was said that the term "criminal prosecution" is the ordinary expression used in legal proceedings as comprising both prosecution by indictment and by information. In the first place, it seems to me that those very Acts of Parliament which have been cited shew that that is not so, for that phrase is never so used. Secondly, so far from saying that that is the ordinary mode in which lawyers speak of prosecutions by way of information, in my opinion that is precisely the phrase which they would not use; and in speaking of prosecutions for libel they would mean a prosecution in the ordinary way by indictment by a bill found by a grand jury, or a prosecution before a magistrate; and in a case of criminal information for libel they would not say that the defendant had been prosecuted, but that he had been tried on an information at the suit either of a private prosecutor or of the Attorney-General.

Therefore, to say that the term "criminal prosecution" is a phrase which is used by all lawyers as one comprising both prosecutions by indictment and by information, is a proposition which cannot be maintained. But that is a general phrase which, according to the ordinary English language and legal scientific language, may comprise several different modes of prosecution—namely, prosecution by way of bill of indictment by a grand jury, prosecution before a magistrate, or prosecution by way of criminal information. Therefore there is a general term which may comprise several modes of dealing with the matter. When in such circumstances the question is raised whether a case which the general term may comprise is not within it, the true canon of construction is that, if it can be shewn that the case is not within the mischief of the enactment, and that to include it will lead to an absurdity, then the Court ought to say that the general phrase does not comprise that particular case, because to include it would produce an absurdity with regard to that which is not within the mischief.

Then we must consider whether the case of a criminal information for newspaper libel is within the mischief of the statute, and also whether if such informations are within section 3 the result must not be an absurdity in the administration of the law. In the first place, it seems to me impossible to say that if the term "criminal prosecution" in section 3 includes prosecutions by way of information, it does not include both criminal informations at the suit of private persons, and also those instituted *ex officio* by the Attorney-General. The question is, whether either or both of these cases are within the mischief of the statute, and whether the application of the section will not produce an absurdity in one or the other. What was the mischief against which the statute was directed? Newspaper proprietors are not entitled with immunity to publish libels for any motive of their own, but are only protected when in certain circumstances they publish libels not for their own purposes, but in order to give information to which the public is said to be entitled. It is obvious that a newspaper proprietor might be harassed by criminal proceedings, and might when publishing information casually publish that which would be a libel against an individual; and then, though the newspaper proprietor might not in truth have been guilty of any practical or moral offence, a person might go before a grand jury without having applied to him or told him that he was going to do so. If the grand jury threw out the bill I cannot say that the newspaper proprietor would be damaged at all; but the bill might be found, and be turned into an indictment for libel, without

his having had any means of knowing of it, and then he would necessarily be put to considerable expense, trouble, and anxiety. A grand jury do not hear the defence, but only find that there is a *prima facie* case: so that if the alleged libel when put in is shewn to be a libel, a bill is found. In the same way a magistrate before whom a prosecutor goes would not hear any defence before he issued a warrant or summons. Therefore the mischief against which the statute was directed was that, for that which was really an unimportant matter, a newspaper proprietor might be put to trouble and expense because a prosecutor could commence proceedings against him without giving him any opportunity of explanation. That mischief is applicable both to the case of prosecution by indictment and of prosecution before a magistrate. Does that mischief apply in the case of a prosecution to be commenced by information either at the suit of a private prosecutor or of the Attorney-General *ex officio*. Upon application to the Queen's Bench Division for a criminal information for libel, the prosecutor brings before the Court the libel, and an affidavit that he is wholly innocent of the charge against him. Upon that a rule *nisi* is granted, and the newspaper proprietor has an opportunity of shewing cause before he is tried by a jury. Therefore in such a case the prosecutor is not empowered to go to the bitter end without interference from any authority; but from the very first step he is brought before the Court, and the defendant is also before the Court, and has the protection of the consideration of the Court. So in the case of an *ex officio* information there is the protection of the responsibility of the Attorney-General, the highest officer at the bar, who, by the oath of his office, is bound in considering anything with regard to criminal prosecutions to exercise his knowledge conscientiously in order to say whether there is a sufficient case for prosecution. Therefore, with regard to informations at the suit of private persons or of the Attorney-General, the mischief aimed at by this statute does not exist.

But it is necessary to go further, and to consider whether if such informations are included within the enactment an absurdity will be produced in respect of either of them, for I think that if the section applies to one it applies to both. It seems to me that an absurdity would be produced in both cases. This depends upon the question when a criminal prosecution by way of information can be said to commence, because the fiat is only required at the moment before the prosecution commences. Upon that point the statute 4 & 5 Will. & M. c. 18 is most important. I cannot doubt that before that statute the commencement of a prosecution by way of criminal information was by exhibiting the information to the proper officer to be filed. Is there anything in that statute to alter that, and to make something else the commencement of the prosecution? It deals with a class of proceedings before the information, and requires the order of the Court of Queen's Bench to file the information. Can it be said that to ask the Court for leave to begin a prosecution is to begin the prosecution? In some cases the leave of a Judge is required before an action can be brought. Can any one say that if an action begins by writ, and it is necessary to go before a Judge for leave to issue the writ, the action commences before the writ is issued? The proposition is that to ask leave to do a thing is to do the thing. It is only necessary to state the proposition to shew the fallacy. Therefore, after the statute, that which was done in the Queen's Bench was preliminary to the commencement of the prosecution; and a prosecution by way of information commences at the time when the information is received by the proper officer and is filed. It was said that the analogy to the case of a summons granted by a magistrate was so close as to oblige us to say that, if that proposition as to the commencement of the prosecution is affirmed, the laying an information before a magistrate in order to obtain a summons is not the commencement of the prosecution. I do not hesitate to say that in my opinion the information laid before the magistrate for the purpose of asking whether he will issue a summons or a warrant is not the commencement of the prosecution, because a magistrate may refuse to issue a summons or warrant, in which case it could not be said that a prosecution had commenced. A prosecution once commenced

can only be ended by the definite conclusion of it. It seems to me that the commencement of a criminal information is the filing or exhibiting of the information. If so, the fiat of the Director need not be asked for or obtained except the moment before that commencement. If so, the application to the Court of Queen's Bench or to the Attorney-General, in order to see whether the information shall be exhibited, may take place before the application to the Public Prosecutor. Therefore it follows that the Court of Queen's Bench may upon the affidavits of both sides make a rule absolute for a criminal information, and then the Public Prosecutor may refuse his fiat. If that proposition is true, he would practically overrule a decision of the Court of Queen's Bench upon solemn argument; and if the application has been to the Attorney-General, he would be practically overruled by the decision of an officer who by the statute which institutes the office of Director is in every way subordinate to him. Therefore in either case the result would lead to an absurdity. Even if the first application to the Court of Queen's Bench were the commencement of a criminal information, then it might be said that before an application could be made to the Court the fiat of the Public Prosecutor would be necessary. Applying that to an *ex officio* information by the Attorney-General, the Executive, on the advice of the law officers, might come to the conclusion that for the public peace an information should be asked for in the Court of Queen's Bench, and yet the Attorney-General would be obliged to go before the Director and ask whether he agreed with the opinion given by the law officers of the Crown. I repeat that by such an application of the enactment the matter is reduced to an absurdity so far as the administration of the law is concerned. Therefore, with regard to the case of an *ex officio* information, I think it is impossible to conceive that the Legislature could have so intended or enacted. If I am right in saying that if the phrase "criminal prosecution" applies to prosecutions by way of information at all, it must apply to those *ex officio* by the Attorney-General as well as to those at the suit of private persons; then if I have shewn that it cannot apply to the one class, it cannot apply to the other. As to informations at the suit of private persons, there is also the fact that they are not within the mischief of the law at all. It does not follow from that that the term "criminal prosecution" in section 3 can have no application. No doubt it applies to prosecutions by way of bill of indictment—in what way I will consider presently—and to proceedings before magistrates.

Then it was argued that we are about to strike out of section 3 prosecutions by way of criminal information, because we say that to include them will produce absurdity in the administration of the law; but that by reason of section 6, which applies the Vexatious Indictments Act to every offence under the Act of 1881, the same absurdity will occur in the case of prosecutions by bill of indictment; and therefore, if we give way to the absurdity in the case of section 3, we shall be obliged to do the same in the case of indictment by bill; and therefore there will not be any proceeding to which section 3 can apply. But the Vexatious Indictments Act obviously applies only to indictments by bill. As to the same absurdity being produced, it must first be noticed that section 6 goes beyond the preamble of the Act, and deals with libels other than newspaper libels. I think the words "and every offence under the Act" must have got into the statute by inadvertence. They apply to newspaper libel, for that is an offence within the Act; but the section cannot apply to criminal information, for that is never begun by bill of indictment. Therefore the effect of the application of the Vexatious Indictments Act is that no bill of indictment for libel is to be presented and found by any grand jury, "unless the prosecutor or other person presenting such indictment has been bound by recognisance to prosecute or give evidence against the person accused of such offence, or unless the person accused has been committed to or detained in custody, or has been bound by recognisance to appear to answer to an indictment to be preferred against him for such offence, or unless such indictment for such offence, if charged to have been committed in Eng-

land, be preferred by the direction, or with the consent in writing, of a Judge of one of the superior Courts of law at Westminster, or of her Majesty's Attorney-General or Solicitor-General for England." With regard to several of these matters they do not arise until the prosecution has commenced: thus the person accused cannot be detained in custody unless a prosecutor has commenced proceedings before a magistrate or a bill of indictment has been found. After an indictment has been preferred, a Judge can issue a warrant. In order to construe section 6, incorporating the Vexatious Indictments Act with regard to a bill of indictment for a newspaper libel within section 3, it must be said either that section 3 gives an alternative protection to that mentioned in the Vexatious Indictments Act, so that if the proposed prosecutor obtains the fiat or complies with that Act he may go on with the prosecution; or, secondly, that he cannot commence the prosecution without both the fiat of the Public Prosecutor and the consent in writing of one of the Judges or the Attorney-General. The same reasons which seem to justify me in saying that the Legislature could not have intended the jurisdiction of the Public Prosecutor to clash with the authority of a Judge or the Attorney-General shew that it could not have been intended that the leave of the Judge could be overruled by the Public Prosecutor, or that the fiat must be obtained before asking leave of the Judge. Both sections are to be read reasonably, and it must be said that at all events the fiat is not required when the Judge or the Attorney-General gives leave to prosecute by bill of indictment. Therefore we do not, as alleged, allow the absurdity in the case of indictment by bill. Acting upon the ordinary canon of construction, that where in a statute there is a general phrase which though it may comprise several specific matters, yet if it is applied to one or more of them will act upon that which is not within the mischief, and will thereby produce an absurdity which it is impossible to suppose that the Legislature intended, then the general phrase is to be left to affect substantially that which is within the mischief, and not that which is not within it. I therefore come to the conclusion that the term "criminal prosecution" in section 3 does not apply to criminal information either at the suit of a private prosecutor or of the Attorney-General *ex officio*. I wish to add that even if it did apply I doubt whether it would go to the extent of being a condition precedent to the jurisdiction of the Court. I think it would rather be a protection to the newspaper proprietor which would have to be proved as a necessary part of the procedure unless he waived the objection. I have considerable doubt, but I am inclined to think that it is a personal protection to the defendant which he might waive, in which case it is a matter of proof in the procedure, and does not go to the jurisdiction of the Court. Therefore, if section 3 did apply, I should have doubted whether the want of an allegation of the existence of the fiat in the information would have been a matter which shewed the Court had no jurisdiction. The objection would have been only to the procedure, and would not have been upon the record, and therefore we could not have taken any notice whether it had been proved or not. Having come to the conclusion that it would be improper, wrong, and absurd to say that criminal prosecutions by way of information are within section 3, I am of opinion that the judgment of the Queen's Bench Division must be affirmed.

Cotton, L.J.—On the last point mentioned by the Master of the Rolls I do not add anything; it was not argued before us, but I think it should be mentioned so that it may not be said that if it is an answer the matter was overlooked by the Court of Appeal. The question is as to the true construction of section 3 of the Newspaper Libel and Registration Act, 1881. I have no doubt that the general words "criminal prosecutions" are sufficient to include certain particular things —namely, prosecutions by way of criminal information, and proceedings before magistrates; but they are not appropriate to criminal informations in the sense of being specifically appropriate, and I should say that they were words not generally used with regard to that mode of prosecuting for an offence. It is said that words

found in a statute ought to be applied even if they lead to absurdity, leaving those who have made the enactment to remedy the mischief. No doubt, where the Legislature has used words which will be deprived of application unless they are construed in a sense leading to absurdity, it is not for any Court to correct that which has been done by Parliament. But it is different where the language used is not specific, but generic, and applies to various things. If the result of applying the general term to a specific thing will produce manifest absurdity, incongruity, or inconvenience, then it is the duty of the Court so to construe the general term as not to apply it to that which it may include, if the provisions are not in the opinion of the Court such that the conclusion must be that the Legislature intended that the general words should have that application. That is a rule of construction which has often been applied, and it is unnecessary to refer to authority to shew that there are many general terms in Acts of Parliament which have been so construed because they included that which either was not within the mischief of the statute, or, if included, would lead to absurdity.

Now we have to consider this: the words "criminal prosecutions" are sufficient to include that class of prosecution which is begun by criminal information. Are they to be unrestricted? All the Judges in the Court below held that *ex officio* informations could not be included in them. If it is admitted that the words do not apply to all cases of criminal information, and that there is an exception from the generality of the words, it only comes to a question whether the reasons for excluding criminal informations at the suit of private prosecutors are sufficient to require us to say that these general words do not apply to that particular kind of prosecution. In the first place, I think that a criminal information, even at the suit of a private prosecutor, is not within the mischief intended to be guarded against by section 3, the object of which was to prevent newspaper proprietors being harassed by vexatious prosecutions for libel. Certain steps must be taken before any criminal information can be exhibited against a newspaper proprietor. It is impossible to say that the mischief can arise until the information is exhibited or filed, when the matter has been before the Court of Queen's Bench, and not only the private prosecutor, but also the person against whom the information was asked for, has been heard, and when we know that the Court is most careful not to allow an information to be exhibited unless it is satisfied that the matter is not only not vexatious, but that it is of public importance, having regard to the charge made and to the person against whom it is made. Having regard to the care taken by the Court in dealing with the affidavits, in my opinion there cannot be any such mischief as was intended to be remedied, even if the prosecution does not commence until after the rule *nisi* has been obtained. Is there any absurdity, incongruity, or inconvenience in allowing the general words to be applied to criminal informations? As regards criminal informations by the Attorney-General *ex officio*, I will not add to what has been said by the Master of the Rolls. But as regards the particular class of information now in question, it is most material, though not essentially necessary, to determine when a criminal prosecution by way of information can be said to commence. It was said on behalf of the plaintiff in error that the first application for a rule *nisi* is the commencement. But how can it be said that a prosecution has commenced against a person before he is summoned to answer any complaint? It is true that the application is made to the Court of Queen's Bench for an order giving leave for an information to be exhibited. I should agree, if necessary, with the Master of the Rolls, that as before the statute of William and Mary no prosecution could be commenced until a criminal information had been exhibited, that is not altered by the fact of the statute requiring an order of the Court before a criminal information can be filed. But independently of that, it is merely asking the Court to order something to be done before the prosecution can be prosecuted—and that is no more the commencement of a criminal prosecution than would an application for an order for a particular person to

issue a writ to commence proceedings in an action be the commencement of the action. It was said that there was an analogy in the case of proceedings before magistrates, and that there was authority to shew that a prosecution before a magistrate commences when the information is laid before him. But such an information is for the purpose of asking him to issue a summons, or warrant, or to commit for trial; but here the application is for the purpose of asking the Court for leave to direct their officer that something shall be done in order to bring the matter into Court. The case of *Clarke* v. *Postan* (2), which was an action against a person for having made a false charge of felony before a magistrate, in no way supports the proposition of the plaintiff in error. Nothing was there said as to when the prosecution had commenced. A prosecution cannot be said to be commenced against a person until he is brought into Court to answer the charge against him. A much clearer authority is the case of *The King* v. *Robinson*, which is referred to in *King q.t.* v. *Cole* as reported in 6 *Term Rep.* 640. The report says, at p. 642, that Lord Chief Justice Kenyon "read a manuscript note of *The King* v. *Robinson* (more fully taken than that in print in the note to *The King* v. *Jones*, 1 *Str.* 704, third edition), in which it was decided that the affidavits on a motion for leave to file a criminal information ought not to be entitled, and if they were they could not be read; that the affidavits produced on shewing cause against the rule might or might not be entitled"—that is, because then the defendant is summoned before the Court—"and that all affidavits made after the rule was made absolute must be entitled"—that is, because then a criminal prosecution had commenced against the defendant, and therefore the affidavits were to be entitled accordingly. That is of much more authority than *Clarke* v. *Postan* (2), where there was a summons before a magistrate which was considered to be the commencement of the prosecution. In the present case the real commencement of the prosecution was when the information was filed, and there would be, in my opinion, the most manifest incongruity, in fact an indecency, in allowing a decision come to by the Queen's Bench Division after hearing the parties, that the criminal information should be filed, to be overruled by the decision of the Director of Public Prosecutions. That would be to set up that officer over the Court. To my mind it would be an indecency to allow him to give a contrary opinion and to prevent the order of the Court from being acted upon. Of course if the prosecution can be said to commence when the application is made for the rule *nisi*, the indecency would not be so great, though it was very strongly argued that the effect of that would be to oust the jurisdiction of the Court by mere general words, whereas specific words would have been used if that had been the intention. In my opinion the prosecution cannot be said to commence when the application is made for the rule *nisi*. If it could be, then although the indecency would not be so great as in the other case, yet it would be sufficient to justify us in saying that the words in question ought not to be held to apply to criminal informations, because the Court in granting the rule *nisi* considers the matter, and sees that there is enough at least for the defendant to be called upon to answer, so as to enable the Court to decide whether or no the matter should proceed further. The Master of the Rolls has mentioned that part of the case which turns upon the statute of William and Mary; but I may observe that there is nothing in that Act to prevent the Court from granting the order on an *ex parte* application. The Act only says that an order shall be made, and it in no way says that the Court before granting the order shall summon the parties before it.

With respect to the other parts of the case, I was startled when it was argued that if section 6 had been out of the way the plaintiff in error would be clearly right. I should have thought that that section was a strong argument in his favour. We have not to decide the effect of section 3 as regards the particulars required by the Vexatious Indictments Act; but, as at present advised, I should be of opinion that the general words of section 3 do not apply to indictments directed by a Judge or by the Attorney-General, or

to cases where the consent of a Judge or of the Attorney-General must be obtained. Even if that be assumed it will not render section 3 inoperative, but there will still be modes of prosecution, though they are not numerous, to which it will apply. Of course it very much reduces the effect of the section; but it must be recollected that section 6 was obviously introduced as applying to all libels—and that may explain the difficulty arising upon it. It was said that the preamble recites that it is necessary to amend the law with reference to criminal prosecutions for newspaper libels. It is true that that would include criminal informations as well as other matters. As I understand the argument, the preamble is to be taken in connection with section 2, which, it was said, must apply to proceedings by way of criminal information; and, therefore, why should not section 3? If section 2 does so apply (and in my opinion it does), it answers the objection in the preamble, because it does amend the law affecting civil actions and criminal prosecutions for newspaper libels. It was intended that the person charged should not be made liable in criminal proceedings, any more than in civil actions, if he could shew that certain things had not been done. That is not a mode of procedure, but a defence, and it would be incongruous to say that in one form of prosecution there would be a defence and not in another. But section 3 gives a protection against vexatious proceedings by way of criminal prosecution; and if there are modes of criminal prosecution not within the mischief of the Act, and the application of the section to them would produce an absurdity, then there is a reason for excluding them, whereas it might not be advisable to exclude a defendant on a criminal information from the defence given in section 2. I am of opinion therefore that the plaintiff in error fails.

LINDLEY, L.J.—I have come to the same conclusion. The question arises upon the construction of the Newspaper Libel and Registration Act, 1881. The term "criminal information" is not to be found in the Act, nor is there any indication that the Act applies to such informations, except from what may be gathered by reasoning from the sections. It may be assumed that a criminal information is a form of prosecution. Section 3 is a wide section, and its words are negative and very extensive, and would be wide enough to cover prosecutions by way of criminal information if there were not good reasons why they should not be so applied. If criminal informations are within the mischief intended to be guarded against by the Legislature, I think that the language is large enough to include them. It is because the criminal informations are within the mischief pointed at by section 2, and because the general language is wide enough to include such prosecutions, that it seems to me that the section may include criminal informations, although not mentioned. The reason is that the words are sufficiently wide to cover them, and the reasons for extending them are the same as for extending them to indictments and actions. In order to shew the reason which induces me to say that section 3 does not apply to criminal informations, it is sufficient to point out what protection has already been provided by law to persons prosecuted in that particular way. By comparing sections 2 to 7, it will be seen that the object of the statute was to protect persons prosecuted for libel, and, in particular, to protect proprietors of newspapers from frivolous prosecutions. What protection was afforded before when they were proceeded against by criminal information? They had every conceivable protection which any one could reasonably require. A criminal information could not be filed *ex officio*, unless the Attorney-General thought that the matter was of so much public importance as to render that desirable. Take the case in question—namely, that of an ordinary prosecution by information at the suit of a private person. Such an information might have been, and probably often was, obtained vexatiously before 4 & 5 Will. & M. c. 18, as is shewn by the preamble. That cannot be done now, but the Court of Queen's Bench must be satisfied by affidavit that the prosecution is proper. What conceivable protection could a reasonable man require further? Therefore it is obvious that prosecutions by way of criminal information

are not within the mischief of section 3. But it does not follow that, because the case is not within the mischief of section 3, it is not within the general words. But the words are general, and there is upon the face of the section a plain indication that at all events *ex officio* informations cannot be included. It is ridiculous to suppose that that section can be intended to apply in Ireland, at all events, to such informations—and there is no reason why it should in England. Apart, therefore, from general reasoning, there appears to me to be an indication from the language of the section that *ex officio* informations are not included. To look further, is it to be supposed that Parliament intended by general words of this kind to bring about that which might be a scandalous conflict of jurisdiction between the Public Prosecutor and the Queen's Bench Division or the Attorney-General? When the Act was passed the Public Prosecutor was a public officer whose duty it was to act and conduct himself under the superintendence of the Attorney-General, and it cannot be conceived that he was to be set up to overrule the Attorney-General. The Court ought not to construe the section so as to bring about such an absurdity, unless it is compelled to do so. Those reasons which I have stated are sufficiently cogent to compel the Court to apply the ordinary principles of construction, and to come to the conclusion that the general words were never intended to apply, and ought not to be construed to apply, to criminal informations of any kind. Considerable difficulty arises on the construction of the Act, but the great difficulty does not arise in this case. Section 6 is strangely worded, and I do not profess to understand it. I have read the Act for the purpose of discovering the meaning to be given in that section to the words "and every offence under this Act," and I have not found it. But we see that all libels are made subject to the provisions of the Vexatious Indictments Act. How is that to be worked into the section which says that no criminal prosecutions for newspaper libel shall be commenced without the fiat of the Director of Public Prosecutions? Working sections 6 and 3 together, the question is as to the joint effect of the two. Where a Judge directs a prosecution for libel there arises a difficulty which is theoretical rather than practical. Is the decision of the Judge or the consent of the Attorney-General to be overruled by the Public Prosecutor? That is so inconsistent and repugnant, that it is almost idle to suppose that after the Attorney-General directs a prosecution under the Vexatious Indictments Act, he is to be overruled by his subordinate. Therefore, although the difficulty is much greater than that with which we have to deal, I should hold with Mr. Justice Field that section 6 does not apply to informations *ex officio* or to other informations, or to prosecutions for libel directed by a Judge or the Attorney-General. There are certain modes of prosecution left to which section 3 can be applied without producing any absurdity or conflict of jurisdiction or other inconvenient result. In my opinion the true construction is that which will avoid that result, and I am, therefore, of opinion that the judgment of the Queen's Bench Division must be affirmed.

Judgment affirmed. Order under 16 *&* 17 *Vict. c.* 32. *s.* 4, *in accordance with the judgment.*

Solicitors—Lewis & Lewis, for plaintiff in error; R. & A. Horne, for defendant in error.

1884. Dec. 17. BROUGHTON AND PLAS POWER COAL COMPANY (LIMITED) (*appellants*) *v.* KIRKPATRICK (*respondent*).

Income Tax—Mines—Deduction from Profits—Dead Rent recoupable by Royalties—5 *&* 6 *Vict. c.* 35. *s.* 60 (*Schedule A, No. III. rule* 3).

The lessees of a coal mine held under an agreement by which it was provided that a dead rent of 2,000*l. should be paid to the lessor, but that when the royalties payable to him exceeded the amount of the dead rent the excess should be repaid to the lessees to make up the deficiency of the previous years. During the three years preceding* 1881–82 *the mine was not worked,*

and the lessees duly paid the dead rent; but in 1881–82 *the mine was worked at a profit, and royalties exceeding the amount of the dead rent by* 1,477*l. were payable to the lessor:*—Held, *that in estimating the profits of the mine for assessment of income tax under Schedule D the lessees could not deduct the* 1,477*l. repayable to them under the agreement.*

The Coltness Iron Company *v.* Black (51 Law J. Rep. Q.B. (H.L.) 626; Law Rep. 6 App. Cas. 515).

Case stated under 43 & 44 Vict. c. 19. s. 59, as to income tax.

At a meeting of the Special Commissioners under the Income Tax Acts, held at the Queen's Hotel, Chester, on Thursday the 15th of March, 1883, the Broughton and Plas Power Coal Company (Limited) appealed against the assessment under schedule D, for the year 1881–82, in the sum of 16,000*l.* in respect of the profits of the concern.

Upon examination of the accounts it was found that the liability of the company for the year 1881–82 was 5,843*l.* as follows—year ended the 31st of March, 1882:—

Balance of account		£2,556
Royalty charged		3,477
Gatewen royalty		1,000
Rent		90
Wayleave		371
Income tax		50
Less depreciation	£1,400	7,544
Bank interest	301	1,701
		£5,843

The Special Commissioners reduced their assessment to this sum.

The Broughton and Plas Power Coal Company (Limited) was formerly a private concern trading at Bersham in the county of Denbigh as the Broughton and Plas Power Coal Company, and was registered as a limited company in April, 1880, but did not commence working or output until the 2nd of October, 1880. Assessments were made by the district commissioners under schedule D of the Income Tax Acts for the years 1878, 1879, and 1880, in the sum of 2,000*l.* each year for dead rent, as the mine was not working.

It is contended by the company that the full amount of royalty worked during the year as shewn in the accounts should not have been disallowed in the assessment for the year 1881–82, inasmuch as the same did not represent the actual sum paid to the landlords.

By the terms of the agreement dated the 30th of September, 1875, under which these collieries are held, the lease was to commence from the 25th of March, 1874, for the term of forty-two years. The dead rent was to be 1,000*l.* a year for the first three years, 2,000*l.* a year for the next seven years, and 3,000*l.* a year for the residue of the term, to be recoupable out of royalties during the first sixteen years, and afterwards the deficiency in any year to be recoupable out of the excess of any of the next five years.

It is explained that the dead rent and royalties are actually one and the same payment and merged together, and the dead rent is a device to secure the lessor against the fluctuations of mining, whereby the lessor receives on account of his share of the profits of the company not less than a certain annual sum, so that when the lessor's share of the royalties does not amount to that sum he receives that sum, but when his share of the royalties exceeds the fixed annual sum the fixed sum is only paid to him until the company has been reimbursed the excess paid to the lessor when his share of the royalties did not amount to the fixed sum.

The company urge that, inasmuch as the fixed sum so paid to the lessor bears income tax when and as it is paid, the repayment to the company of the sum so advanced should be deducted in assessing the profits of the company, for otherwise the sum so replaced will bear income tax twice—namely, first when it was advanced by the company to the lessor, and, secondly, when it is repaid to the company out of the lessor's surplus over and above the fixed sum.

The company, therefore, claim that a sum of 1,477*l.* in the assessment for 1881–82 should be allowed from that assessment, on the ground that it has already borne income tax when it was previously paid to the lessor. The Special Commissioners held that the sums for royalties charged in the accounts were disallowed in arriving at

the foregoing assessable profits in accordance with section 60 of the Act 5 & 6 Vict. c. 35 (Schedule A, No. III. rule 3), which enacts that the duty in the case of mines is to be charged on the person, corporation, company, or society of persons carrying on the concern, or on their respective agents, treasurers, or other officers having the direction or management thereof or being in the receipt of the profits thereof, on the amount of the produce or value thereof, and before paying, rendering, or distributing the produce or the value either between the different persons or members of the corporation, company, or society engaged in the concern, or to the owner of the soil or property, or to any creditor or other person whatever having a claim on or out of the said profits, &c.

The appellants expressed their dissatisfaction with the determination of the Special Commissioners as being erroneous in point of law, and duly required the commissioners to state and sign a Case for the opinion of the High Court of Justice according to the Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 59.

A. Charles, Q.C. (*Clement Higgins* with him), for the appellants.—By the arrangement between the landlord and the lessees, the landlord, instead of receiving a rent uncertain, bargains for a rent certain, and whenever the royalties exceed the dead rent he returns the excess to make up the deficiency of the previous years. Up to October, 1880, the mine was unworked, consequently the lessees paid the dead rent of 2,000*l.*; in 1881–82 the mine was worked for the first time, and the royalties amounted to 3,477*l.*, or 1,477*l.* in excess of the dead rent of 2,000*l.* paid in the previous year, and this portion of the royalties is repayable to the lessees in accordance with their agreement. This sum has already paid income tax when paid in the shape of dead rent. In the case of mines the annual value is to be calculated on an average of the five preceding years—(see 5 & 6 Vict. c. 35. s. 60, schedule A. No. III.; 29 Vict. c. 36. s. 8); and in the four preceding years there has been a deficiency which, added together, exceeds the profits of year 1881–82; the Government has been receiving income tax upon the dead rent paid in those years, and now seeks to obtain income tax on the whole of the profits made in 1881–82.

The Attorney-General (*Dicey* with him), for the respondent.—The income tax on the dead rent in the years preceding 1881–82 was not paid by the lessees but by the landlord, having been deducted by the lessees under the positive duty imposed on them by 5 & 6 Vict. c. 35, schedule A. No. IV. rule 9. The case of *Knowles* v. *McAdam* (1), where it was held that in estimating the profits of a coal mine a deduction for replacing exhausted capital ought to be allowed, is in principle the same as the present case; but that case was overruled in the case of *The Coltness Iron Company* v. *Black* (2), where it was held that antecedent loss or expenditure cannot be deducted in estimating the profits received. The 1,477*l.* was profits, and the destination of the amount is immaterial.

A. Charles, Q.C., in reply.

GROVE, J.—I am of opinion that the Crown is entitled to judgment, and that the appellants must therefore pay income tax on the 1,477*l.* in respect of which they have claimed exemption. The question on which our judgment depends is the meaning to be given to the word "profits" in the Revenue Acts. In *The Coltness Iron Company* v. *Black* (2) it was decided that by the word "profits" in the case of a mine is meant the profits of a given year *minus* the expenditure, and that losses which have been previously incurred cannot be set off. These antecedent losses could not be ascertained without an investigation of the whole undertaking. In the present case the lessees have agreed to pay the landlord a dead rent of 2,000*l.*, and this they have to pay if they make no profit. The lessees pay no tax on this 2,000*l.*; the landlord pays the tax, the lessees are merely his agents to collect it: therefore while the mine was a losing concern they paid no tax; but can they when the mine becomes profitable deduct the losses of previous years? The case in the House of Lords says they cannot. The bargain with

(1) 47 Law J. Rep. Exch. 139; Law Rep. 3 Ex. D. 23.

(2) 51 Law J. Rep. H.L. 626; Law Rep. 6 App. Cas. 515.

the landlord is that the dead rent is to be recoupable out of royalties, but we cannot entertain the effect of that agreement any more than any other antecedent losses. The Act 5 & 6 Vict. c. 35. s. 60. No. III. says that the duty is to be charged on the company &c. carrying on the concern on the amount of the produce or value thereof, and before paying, rendering, or distributing the produce or value either between the different persons members of the company, or to the owner of the soil or property, or to any creditor or other person whatever having a claim on or out of the said profits. The duty, therefore, became due to the Crown as soon as the profit was made. This case appears to be decided by *The Coltness Iron Company* v. *Black* (2), the only difference being that in that case there was no bargain with the landlord, a distinction which in my judgment makes no difference. I come to the conclusion, therefore, that the present case is covered by the decision in the House of Lords, and that our judgment must be for the Crown.

SMITH, J.—I am of the same opinion. By agreement between the lessor and lessees the lessees agreed to pay a certain dead rent to be recoupable out of royalties. No work was commenced on the mine until 1880; for the three preceding years the lessees paid the dead rent. The lessees commenced working in October, 1880, and it is found that the output in the years 1881–82 amounts to 5,843*l.* net, consequently the lessees have converted coal into money amounting to 5,843*l.* It cannot be denied that this amount is profit; but it is said that before this is put down to profit the lessees are entitled to deduct the amount overpaid in previous years, which by their agreement is recoupable out of the royalties. It is said that income tax will be paid twice on this amount, and it appears that it will, but not by the lessees —consequently they are not damnified. What, then, is this 5,843*l.*? It is money obtained by carrying on their concern. The 2,000*l.* dead rent may be set down to capital account. The point before us resolves itself into the question of what is annual profit, and as to this the remarks of Lord Penzance in *The Coltness Iron Company* v. *Black* (2) seem to be applicable, where he says that this is the entire profit derived from the mine, deducting the cost of working it, but not deducting the cost of making it. I agree, therefore, that our judgment should be for the Crown.

Judgment for respondents.

Solicitors—Meredith & Co., agents for Birch, Cullimore & Douglas, Chester, for the appellants; Solicitor of Inland Revenue, for respondents.

1884. July 5; Dec. 13, 15, 20. } THE ATTORNEY-GENERAL OF THE DUCHY OF LANCASTER *v.* THE DUKE OF DEVONSHIRE.

Information — Duchy of Lancaster — Rights—Attorney-General in High Court —Crown Suits Act (28 *&* 29 *Vict. c.* 104).

An information cannot be exhibited in the High Court of Justice by the Attorney-General of the Duchy of Lancaster even in respect of matters concerning the duchy.

This was an application on behalf of the Duke of Devonshire, who had been made a defendant to an information, to have that information removed from the file, and all further proceedings stayed, on the ground that the same was not exhibited by Her Majesty's Attorney-General, and that the informant was not authorised or entitled to exhibit or file the said information on behalf of Her Majesty, or to take, or continue, any proceedings in or under the same.

The information in question was filed on the 22nd of December, 1881, the informant being Henry W. West, Q.C., the Attorney-General of Her Majesty's Duchy of Lancaster, and prayed that it might be declared that Her Majesty was from the death of William 4 seised, in right of her Duchy of Lancaster, of the reversion in fee of certain gritstone and other stone in Fairfield, Derbyshire; and also that the defendant might be ordered to render an account of the quantities of gritstone and other stone taken from cer-

tain quarries in Fairfield, and of all rents, royalties, and sums of money received by the defendant for and in respect of the said gritstone and other stone raised from the said quarries since the death of the defendant's predecessor in 1858.

The defendant, by his answer filed on the 1st of July, 1882, claimed the quarries as his own freehold. A further answer was put in on the 28th of March, 1883, and the case was fixed to be argued on the 2nd of June, 1883. On the 29th of May, 1883, the defendant for the first time gave notice of the present application, and two days later filed a further answer to the information.

The following are the terms of the patent under which the present informant was appointed, so far as they are material:

"Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, To all to whom these Our present Letters shall come, greeting, Know ye that we, fully trusting and confiding in the fidelity of Our Trusty and Well Beloved Henry Wyndham West, Esquire, of the Inner Temple, one of Our Counsel learned in the law, and of our special grace and mere motion, and for divers good causes and considerations Us hereunto specially moving, Have ordained, constituted, deputed, and assigned, and by these Presents do ordain, constitute, depute, and assign, the said Henry Wyndham West, Attorney-General of our Duchy of Lancaster, in all and singular suits, complaints, businesses, matters, and causes, in all our Courts whatsoever and elsewhere concerning the same Our Duchy of Lancaster, as well in the parts of Our Kingdom of Great Britain called England, as in the parts of Wales, or belonging to us by reason of our said Duchy," &c.

The nature of the case sufficiently appears from the arguments and judgments.

Wills, Q.C., Mellor, Q.C., Charles, Q.C., Edwin Jones, and *Elton,* for the defendant. —Such a proceeding as this has never been attempted during the last four hundred years. It was attempted at one remarkable period of our history, when Sir Richard Empson was Attorney-General for the duchy, to file an information in the name of the duchy; but he was stopped because the Courts refused to issue process upon it. An Act of Parliament (22 Edw. 4) was then passed in 1483, empowering the Courts to do so, and that was repealed in 1484 by 1 Rich. 3, as being injurious to the subject though profitable to the Crown.

The forms of the patent under which the Attorney-General for the duchy is appointed have been subject from time to time to variation, and some years after this attempt on the part of the duchy in the fifteenth century the patents fell away into a more restricted form. But in 1880 the form of the patent was altered so as to correspond with the Empson patent. It cannot be disputed that ever since Empson's time, informations, whenever they have been filed on behalf of the duchy in the Queen's Courts at Westminster, have been filed in the name of Her Majesty's Attorney-General, and that whenever the Attorney-General for the duchy has filed them they have been filed in the Courts of the duchy, and there only. In the *Placita de Quo Warranto* there are many instances to shew that originally the Crown was sued by original writ just like any private person. Then came the procedure by petition of right in the reign of Edward 1, and subsequently in the reigns of Henry 6 and Edward 4 the mode of proceeding by way of information. This proceeding by information was established as the result of a great and severe struggle on the part of the Crown with the Commons. The history relating to the charters for the Duchy of Lancaster, and the charters, are collected in *Hardy's Charters of the Duchy of Lancaster.* The first was granted in 1343 (16 Edw. 3). Then came the charter of 1352 (25 Edw. 3), which created the Courts of the duchy, and conferred amongst other things *jura regalia* pertaining to the county palatine as freely and entirely as the Earl of Chester is well known to hold them in the county of Chester. After other charters came an Act of Parliament passed upon Edward 4 succeeding to the throne; and this statute incorporated the duchy and ordained that Edward 4 should hold the duchy to him and his heirs for the Kings of England in perpetuity. It also ordained that the county of Lancaster should be joined to the duchy and form a

county palatine, and that there should be a seal of the county palatine and a seal of the duchy. Shortly afterwards Empson became Attorney-General of the duchy, and his appointment, as has been already stated, was in terms almost identical with those of the present Attorney-General of the duchy. Now the fact that the statute 22 Edw. 4 had to be passed, in order to get the Judges of that day to issue process for an information filed by the Attorney-General for the duchy, shews clearly that Empson could not get on without it; and this Act was repealed exactly a year afterwards by 1 Rich. 3. From that time no information has ever been filed in the King's Courts by his Attorney-General for the duchy, though many informations have been filed by the Attorney-General for the Crown within the duchy. The writ of information being a prerogative and the right of the Crown alone, the appointment made under the seal of the duchy confers only the *jura regalia* within the duchy, and not elsewhere.

Lastly, the provisions contained in the Crown Suits Act (28 & 29 Vict. c. 104) seem to be altogether inconsistent with the right now claimed by the Attorney-General for the duchy. That Act, intituled "An Act to amend the proceedings and practice in Crown suits in the Court of Exchequer at Westminster, and for other purposes," regulates by Part 2 the proceedings by information. By section 5, sub-section 1, "the provisions of this Act relative to Her Majesty's Attorney-General shall be construed as applying also to Her Majesty's Solicitor-General when a vacancy in the office of Attorney-General or other occasion so requires." By sub-section 2: "the provisions of this Act relative to the Crown, or to Her Majesty in right of the Crown, shall be construed as applying also to the Duchy of Lancaster, or to Her Majesty in right of that duchy, when the occasion so requires." By sub-section 3, "the terms 'party' and 'parties' where used in this Act include, and the same terms where used in an enactment extended and applied by this Act shall for the purposes of this Act include, Her Majesty's Attorney-General and the Attorney-General for the Prince of Wales and the Duke of Cornwall, as the case may require." By section 6, "the term 'information' means an information, styled an English information, exhibited in the Court of Exchequer in the name of Her Majesty's Attorney-General, or of the Attorney-General of the Prince of Wales and Duke of Cornwall, as the informant, and includes an information and bill." If therefore it be true that the Attorney-General for the duchy has power to file an information such as this, then, inasmuch as no provision has been made in that statute for any such information, the result is that the defendant is relegated to an unknown practice. They also cited *Clarke* v. *Bradlaugh* (1), *The King* v. *Berchet* (2), *Cotton* v. *Johnson* (3), *Astill* v. *Clarke* (4), and *Year Books*, 6 Hen. 4. p. 4, pl. 3; 21 Edw. 4. p. 60, pl. 17; and 26 Hen. 8. p. 9, pl. 3.

West, Q.C., *Davey, Q.C.*, and *Trevelyan* shewed cause.—One of the great objects in having the terms of the patent altered was to save parties the expense of litigating in matters of this sort in Courts of the Duchy Chamber. The charter of Edward 4, which settled the duchy upon the Kings of England, was careful to keep the Government separate, though the king, having a good title to the throne, did not care to keep the title separate as some of his predecessors had done. Up till the time of that charter the Attorney-General of the duchy was never styled "the King's Attorney-General of the Duchy"; but from the time of Edward 4 down to the present day he is always called "our Attorney-General for the affairs of our Duchy of Lancaster," and it is contended that he is entitled as such to act in all Courts for the purposes of the duchy. The Queen may sue in what Court she pleases, and has a right to appoint any person she likes to represent her as her attorney. It is submitted that by the terms of the patent granted in 1880 the Attorney-General for the duchy was authorised to appear and to conduct such litigation as is necessary in Her Majesty's interest relating to the affairs of the Duchy of Lancaster. It may be objected that

(1) 52 Law J. Rep. Q.B. 505; Law Rep. 8 App. Cas. 354.
(2) 1 Show. 106.
(3) 3 Salk. 110.
(4) 3 Lutw. 1233.

the patent itself is not under the Great Seal, and that Her Majesty is not at liberty to use her seal to the Duchy of Lancaster for the purpose of appointing the Duchy Attorney to conduct this litigation on her behalf, and to inform the Court on Her Majesty's behalf of the claim which she is advised that she has against the defendant in respect to duchy property. But all Courts recognise the duchy seal—see 4 *Inst.* c. 36, p. 206; and this being a duchy matter, it is submitted the appropriate seal has been used.

As regards the Crown Suits Act, the Attorney-General for the duchy is, it is submitted, within the definition clause; but if not, there was a *casus omissus*, and the proceedings would be by analogy. The information has been drawn so as to come either within the Crown Suits Act or under the old procedure.

The following cases were cited during the argument—*Fleetwood* v. *Poole* (5), *Alcock* v. *Cooke* (6), *The King* v. *Gregory* (7), *Fisher* v. *Batten* (8), *Burgess* v. *Wheate* (9), and *The King* v. *Wilkes* (10).

Mellor replied.

Cur. adv. vult.

The judgment of the Court (Mathew, J., and Day, J.) was delivered on the 20th of December, 1884, by

MATHEW, J.—This was an application on the part of the defendant to remove from the file an information exhibited by the Attorney-General of the Duchy of Lancaster to compel the defendant to account for certain royalties and rents alleged to be payable in respect of certain property held by him within the duchy. The ground of the application was that the right to file such an information belonged exclusively to the Attorney-General of the realm, and that the proceeding of the Attorney-General of the duchy was an attempt to create a new remedy against the subject without the sanction of Parliament. In answer to the application, the Attorney-General of the duchy relied upon letters patent issued to him under the seals of the County Palatine and Duchy of Lancaster, which empowered him to represent the Crown, in the following terms, omitting the formal part:—"We of our especial grace, certain knowledge, and mere motion, and for divers good causes and considerations us hereunto especially moving, have ordained, constituted, deputed, and assigned, and by these presents do ordain, constitute, depute, and assign, the said Henry Wyndham West, Attorney-General of our Duchy of Lancaster, in all and singular suits, complaints, businesses, matters, and causes in all our Courts whatsoever and elsewhere concerning the same our Duchy of Lancaster, as well in the part of our Kingdom of Great Britain called England, as in the parts of Wales, or belonging unto us by reason of our said duchy." In order to deal with the question, it is not necessary to refer at length to the well-known history of the duchy as set forth in the 4th *Coke's Institutes*, c. 36. It is sufficient to say that by letters patent of the 25th Edward 3 *jura regalia* were, with the exception therein specified, conferred within the duchy upon the Duke of Lancaster. Under this patent, the Courts of the duchy were constituted, and the offices of Chancellor and Attorney-General of the duchy were created. By a further charter of 1 Henry 4, which confirmed former charters, it was directed that the duchy should be held by the king and his heirs separate from the Crown, and to remain and descend as before his accession to the Crown. By charter of 4 Henry 5 it was provided with the sanction of Parliament that no grants relating to the duchy passed under any other than the seal of the duchy should be valid. By charter of 1 Edward 4 it was directed that the duchy should be incorporated and should be held by the king and his heirs being Kings of England. The records referred to in the course of the argument, and exhibited to the affidavits filed in the cause, contain specimens of the letters patent issued up to this time to the attorneys of the duchy. In some, authority was given to do whatsoever to the office of Attorney-General duly pertains. In one, dated 1399, the Attorney-General was empowered to represent the Crown in all the King's Courts,

(5) 1 Hardr. 171.
(6) 5 Bing. 340.
(7) 2 Lev. 82.
(8) 1 Vent. 155.
(9) Eden, 189.
(10) 4 Brod. P.C. 360.

Att.-Gen. of Duchy of Lancaster v. *Duke of Devonshire.*

By statute 22 Edward 4 the right would appear for the first time to have been conferred upon the Attorney-General to file an information in any of the king's Courts. By that statute, after reciting the rights of the king in the duchy, it was provided that "if the Kyng's Attourney-Generall of His said Duchie of Lancaster for the tyme beyng put a bill into eny of the Kyng's Courts by wey of enformation shewyng in the same to the Court what and wherin the Kyng or eny other to his use should be unlawfully hurted or wronged in anything to hym apperteynyng in the right of the same duchie, that forthwith at the request of the same attourney, the Justices of the same Court where the said bill and enformation shall rest shall have power uppon the same to awarde processe by *capias*, and to make other such processes into every countie of England as by the cours of the lawe shuld be made upon that matter if ther were therupon due originall sued by the ordre of the lawe, or such processe for the same as shuld be awarded for the Kyng for like offence doon to hym in the right of his Corone."

That these powers were new, I think, is clearly shewn by what I shall have to refer to presently, and what occurred in the subsequent reign of King Henry 8. Now, proceeding by way of information had for some time previously been had recourse to in the interest of the Crown, but under continual protest from those against whom it had been employed as an excess of the prerogative, and in the Rolls of Parliament down to the time of Henry 5 many instances will be found where such protests against information were made successfully. The statute-book shews how sturdily the contest was afterwards maintained; but, nevertheless, two kinds of information did ultimately take root in the law—criminal informations, filed in the Queen's Bench; and informations in Chancery, like the present, on the equity side of the Exchequer. With respect to the first, since 4 & 5 of Will. & M., the right of proceeding without the leave of the Crown has been finally confided to the Attorney-General of the realm, who, as a member of the Executive Government, is responsible for the manner in which his duties are performed With respect to the second, it is a significant fact that counsel for the duchy have been unable to point to a single instance of an information by any other person than the same high official.

In the reign of Edward 4 Sir Richard Empson was appointed Attorney-General for the duchy; and the statute of 22 Edw. 4 would seem to have been intended to arm him and his successors with new powers against those by whom the rights of the king, as Duke of Lancaster, were supposed to have been infringed. The statute, however, was not suffered to remain in operation for more than a year, for by 1 Rich. 3 it was repealed in the following terms:—"The Kyng, notwithstandyng that he conceyveth the said Acts to be to his greate profite and availe, and to the grete hurt and thraldome of his subgietts, havyng more affection to the common wele of this his Realme and of his subgietts than to his own singler profitt, by the advise of his Lordes Spirituelx and Temporelx and the Comons in this present Parliament assembled, and by auctorite of the same, hath ordeigned, enacted, and stablished that the foresaid Actes and every of theym be annulled, repeled, and of no force ne effect, and that his said subgietts stande and be at their liberties and freedom in like fourme as they were before the makyng of the same Actes."

Empson continued in office in the reign of Henry 7, under letters patent which appointed him "attorney of our duchy in all and singular suits, plaints, matters, causes, and businesses in whatsoever Courts of the King, and elsewhere, concerning the King's same duchy."

There is no record during this reign of any proceedings in the King's Courts by information filed by the Attorney-General of the duchy. From what is known of the history of the times, and from the fact that letters patent were afterwards granted by Henry 7 to William Eryngton in the form of Empson's patent, it may have been that the proceedings condemned by the Act of Richard 3 were continued. It is, however, matter of history that at the beginning of the reign of Henry 8 the modes of instituting proceedings for the king which had previously been adopted by Empson were abandoned, and popular

indignation was to some extent allayed by the execution of Empson on a frivolous charge of high treason; and other means were substantially devised for providing for the necessities of the Crown which were more acceptable to the king's subjects than those which had been made use of in the time of his predecessors.

The letters patent granted in 10 Hen. 8 to John Hales appointed him Attorney-General in the Courts "within the duchy," and were thus, as it would seem, brought into harmony with the law. This form has been followed in the letters patent granted ever since the year 1519 down to the year 1880. From the searches made into the records, the result of which was fully brought before the Court by counsel on either side, two very important points appear to be established. On the one hand, from the year 1519 down to the year 1880, there is no instance of an information filed in the King's Courts in any matter concerning the duchy by the duchy Attorney-General; and, on the other hand, in every reign down to the year 1874 the informations filed in the Supreme Courts in duchy matters were exhibited by the Attorney-General of the realm. Further, by the Crown Suits Act, 28 & 29 Vict. c. 104, the right to file such an information as this seems clearly to be treated as belonging to the Queen's Attorney-General, and not to the Attorney-General for the duchy.

In the year 1880, for reasons which, it must be said, are in no way open to censure, it occurred to the Attorney-General for the duchy that it would be convenient to alter the form of the letters patent; and Her Majesty was pleased, in accordance with the advice which was given her by the officers of the duchy, to permit the suggested alteration to be made. The patent, which had been granted in the first instance to Mr. West in the year 1859, was cancelled, and new letters patent were prepared substantially in the form in which they had been granted to Empson in the reign of Edward 4 and Henry 7.

The first observation to be made on these letters patent is that, in terms, the right to file information in the royal Courts is not given, and if it were intended that the grantee should have the power of representing the Crown with reference to duchy matters which had previously been exercised by the Queen's attorney, it seems probable that this intention would have been plainly stated. If the argument addressed to us by the Attorney-General for the duchy is well founded, he is for all purposes connected with the duchy in the position of the Attorney-General of the realm; and, if this be so, he would be entitled to file an *ex officio* information. Again, the letters patent do not recite those granted to the then Attorney-General, Sir John Holker, and do not state whether the rights of the Attorney-General of the duchy are co-ordinate or exclusive. Further, the patent does not refer to the Crown Suits Act, and no provision is made for the procedure upon duchy informations.

The rule for dealing with grants from the Crown under the circumstances is laid down in the case of *The Queen* v. *The Eastern Archipelago Company* (11). If the grant be framed in terms so uncertain that it cannot be applied with that precision which grants from one so especially representing the public interest ought in reason to have, or if the grant reasonably construed would work a wrong or something contrary to law, it will be either wholly void, or restrained, according to circumstances, with the view of effectuating what must be presumed to be the real intention of the grantor.

We cannot suppose that it would have been meant by such means as the grant of the letters patent in question to require the Judges to create a new legal remedy of so formidable a character. There is no precedent, so far as we are aware, in Constitutional times for such an alteration of the procedure of the Courts otherwise than by statute. The interpretation which the letters patent must receive does not, therefore, justify the present proceeding by the Attorney-General of the duchy; and it appears to us that we have no more power to sanction what has been done than we should have to permit a civil action to be commenced by a writ of attachment, or a *capias*, or a subpœna.

(11) 1 E. & B. 310; 2 ibid. 857.

Such an information as this can only be filed by the Attorney-General of the realm, and the application must therefore be granted.

Application granted.

Solicitors—F. Whitaker, for informant; Currey, Holland & Currey, for defendant.

[IN THE COURT OF APPEAL.]

1885. Feb. 4. } CROFT v. THE LONDON AND COUNTY BANKING COMPANY.*

Landlord and Tenant—Action of Ejectment—Forfeiture—Non-payment of Rent—Relief—Terms on which granted—Practice—Plaintiff deprived of Costs at Trial—Common Law Procedure Act, 1860 (23 & 24 *Vict. c.* 126), *s.* 1.

A defendant, against whom judgment has been obtained in an action of ejectment for non-payment of rent, in which action the plaintiff has been deprived of costs, may obtain relief after the trial, under section 1 *of the Common Law Procedure Act*, 1860, *upon payment of all rent due and the costs of the application for relief, without being required to pay the costs of the action.*

Appeal by the plaintiff from an order of the Divisional Court granting the defendants relief against forfeiture for non-payment of rent, but refusing the plaintiff the costs.

The plaintiff was the assignee of the reversion of a lease of three dwelling-houses for ninety-nine years, of which one Collingwood was the lessee. In 1883, Collingwood having become bankrupt, the trustee assigned the lease to the defendants. The plaintiff, subsequently to the bankruptcy of Collingwood, brought an action to recover possession of the premises, in which Collingwood pleaded that he had no property in the premises, that he was not in possession, and that he had become bankrupt. Notwithstanding this, the plaintiff signed judgment, and, finding afterwards that Collingwood was not in possession of the premises at the time when he brought the action, commenced the present action against the defendants.

At the trial Stephen, J., gave judgment for the plaintiff, but without costs, being of opinion that the first action had been wrongly brought against Collingwood, and that the present action was oppressive and unnecessary; leave was reserved to the defendants to apply at chambers for relief.

The defendants then took out a summons under the Common Law Procedure Act, 1860, section 1, for relief against the forfeiture. This summons was referred by Pollock, B., to the Court.

The Divisional Court (Lord Coleridge, C.J., and Stephen, J.) granted the relief sought, but allowed the plaintiff no costs.

The plaintiff appealed.

H. Terrell (with him *T. Terrell*), for the plaintiff.—The relief sought by the defendants can only be granted on payment of all rent in arrear and full costs—Common Law Procedure Act, 1852, section 210, and Common Law Procedure Act, 1860, section 1. The full costs here include the costs of both actions—that is, the costs which have been incurred by the landlord in obtaining possession. Even if a lessee proceeded in a Court of equity, he would not be entitled to relief by injunction restraining proceedings, except upon payment of both rent and costs—Common Law Procedure Act, 1852, section 211. The jurisdiction of a Court of equity or law as to the terms upon which relief after judgment will be granted is expressly limited by these sections. The mere fact of the plaintiff having been deprived of costs at the trial does not affect the provisions of the statute. *Woodfall on Landlord and Tenant* (12th ed., p. 304) was also referred to.

Finlay, Q.C., and *C. K. Francis*, for the defendants.—A defendant who applies for relief after judgment obtained under section 210 is only required to pay such costs as the plaintiff is entitled to. Here the costs of the plaintiff were entirely in the discretion of the Judge at the trial, and were disallowed. The Court will not interfere with that discretion.

Terrell replied.

* *Coram* Brett, M.R., Cotton, L.J., and Lindley, L.J.

Croft v. *London &c. Banking Co., App.*

BRETT, M.R.—The plaintiff had brought an action of ejectment against Collingwood, in which he pleaded that he was not in possession, either personally or by receipt of the rent, that he had no interest whatever in the houses, and that he was a bankrupt. The plaintiff obtained judgment in that action, and, finding afterwards that the lease of the houses had been assigned to the defendants, he commenced the present action. Before this action was brought, the defendants offered to pay all arrears of rent due, and afterwards pleaded a tender before action of the amount due, and paid the same into Court. The plaintiff obtained judgment at the trial, and it must therefore be assumed that, although the defendants offered to pay the rent, they did not do all that was necessary to make the offer a legal tender, and that there was a forfeiture for non-payment of the rent. The defendants here claim equitable relief under the Common Law Procedure Act, 1860, section 1, and the case must be dealt with as if it had been heard in a Court of equity. The discretion of the Court as to granting relief is not limited by the provisions contained in section 210 of the Common Law Procedure Act, 1852, as to the payment of costs. The Divisional Court, at the hearing of the application for relief against the forfeiture, came to the conclusion that it ought to be granted, and I see nothing in that section to prevent the Court from granting relief upon due and proper terms. The Court were right in thinking that as the ejectment had been brought after the defendants who claimed relief had offered to pay the rent, the relief ought to be granted without making them pay the costs of the action to the plaintiff. That would be only common justice, and a proper order to be made. The costs of the application for relief ought, however, to be provided for; and therefore, upon the defendants giving an undertaking to pay the costs of the summons at chambers —for these are the only costs to which the plaintiff is entitled—the appeal will be dismissed.

COTTON, L.J.—I agree. The application for relief is made to the Queen's Bench Division exercising the jurisdiction of a Court of equity. In order to determine this question, sections 210 and 211 of the Common Law Procedure Act, 1852, must be referred to. Section 211 imposes certain terms as to the payment of rent and costs; and if these terms are not complied with, the common injunction to restrain proceedings at law for non-payment of rent will not be granted or continued by a Court of equity. Assuming no full and complete answer had been made by the defendants within the time limited by the section, the plaintiff, independently of any statutory enactment, would have been entitled to have the injunction discontinued. But as the common injunction is an interlocutory injunction, the powers of the Court as to the terms upon which relief will be granted at the hearing are limited by that section. It was then said that under section 210 the plaintiff was entitled not only to the rent, but also to the costs of both actions. But at the time when judgment was signed against Collingwood, he had no estate at all in the property, he was not even in possession, and having become bankrupt, whatever interest he had in it had passed to his trustee, subject to the rights of the defendants. The judgment was therefore a nullity, and as the defendants at that time did not require relief they ought not to be required to pay the costs of that action. That case is not provided for by statute. The only provision is in respect of relief to be granted to a person who but for the forfeiture would be in possession. In the second action the plaintiff was deprived of costs; he is not therefore entitled to the costs of that action under section 210. The defendants having before action offered to pay the rent, it would, in my opinion, be reasonable that they should obtain relief without having to pay those costs.

LINDLEY, L.J.—I am of the same opinion. This was an application for relief after judgment. In order to obtain relief the defendants had before action offered to pay all rent in arrear, but it would seem that they had not made a legal tender, for judgment was obtained by the plaintiff against them. It was contended on behalf of the plaintiff that the defendants were only entitled to relief on payment of the costs of the two actions. In the present

action the plaintiff got no costs, upon the ground that it was improperly brought against the defendants, who ought not therefore to be made to pay them; but it was said that relief ought not to be granted unless those costs were paid by them. I see no reason, however, why they should be ordered to pay costs of which the plaintiff has been deprived. It was also said that they ought to pay the costs of the action against Collingwood, because they claim under him; but that action was wrongly brought, and the judgment was mere waste paper, having been obtained under circumstances which were unjustifiable. It would therefore be extremely unfair to order them to pay those costs. I think, however, that they ought to pay the costs of the summons at chambers; and, upon an undertaking being given to pay those costs, the appeal will be dismissed.

Appeal dismissed.

Solicitors—C. A. Russ, for plaintiff; A. E. Francis, for defendants.

1884. Dec. 16. FELLOWS v. THORNTON. (YOUNG, *garnishee.*)

Creditor and Debtor — Judgment over six years old—Execution—Garnishee Order — Attachment — Rules of Court, 1883, *Order XLII. rules* 6 *and* 8; *Order XLV.*

A garnishee order can be obtained in respect of a debt due to a judgment debtor notwithstanding that more than six years have elapsed since the date of the judgment.

In this case the plaintiff (the judgment creditor) had obtained a judgment against the defendant (the judgment debtor) in July, 1876, for the sum of 365*l.* 15*s.* 6*d.* and costs, of which 310*l.* 14*s.* 10*d.* was still due and owing. In 1884 application was made to a District Registrar for a garnishee order to attach present and all future rent which was or might become due to the defendant in respect of certain property of which the garnishee was trustee for him. The order *nisi* was made on the 22nd of October, 1884, at which time the only rent actually due was 13*l.* 8*s.*, which sum was admittedly in the hands of the garnishee's solicitor. On the 26th of November, 1884, the order, notwithstanding objection taken that the judgment debt was more than six years old, was made absolute by a District Registrar; but upon appeal to Pollock, B., at chambers, the learned Judge set aside the order as irregular inasmuch as it extended to future debts (1).

The plaintiff appealed.

(1) By Order XLII. rule 6 of the Rules of the Supreme Court, 1883, "a judgment for the recovery of any property other than land or money may be enforced—(*a*) by writ for delivery of the property, (*b*) by writ of attachment, (*c*) by writ of sequestration." By rule 7, "a judgment requiring any person to do any act other than the payment of money, or to abstain from doing anything, may be enforced by writ of attachment or by committal." Rule 8, "In these rules the term 'writ of execution' shall include writs of *fieri facias*, *capias*, *elegit*, sequestration, and attachment, and all subsequent writs that may issue for giving effect thereto. And the term 'issuing execution against any party' shall mean the issuing of any such process against his person or property as under the preceding rules of this Order shall be applicable to the case." Rule 22, "As between the original parties to a judgment or order, execution may issue at any time within six years from the recovery of the judgment or the date of the order." Rule 23, "In the following cases—namely, where six years have elapsed since the judgment or date of the order, or any change has taken place by death or otherwise in the parties entitled or liable to execution, . . . the party alleging himself to be entitled to execution may apply to the Court or a Judge for leave to issue execution accordingly. And such Court or Judge may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect, or may order that any issue or question necessary to determine the rights of the parties shall be tried in any of the ways in which any question in an action may be tried. And in either case such Court or Judge may impose such terms as to costs or otherwise as shall be just."

Rule 1 of Order XLV., intituled "Attachment of Debts," provides as follows: "The Court or a Judge may, upon the *ex parte* application of any person who has obtained a judgment or order for the recovery or payment of money either before or after any oral examination of the debtor liable under such judgment or order, and upon affidavit by himself or his solicitor stating that judgment has been recovered on the order made, and that it is still unsatisfied, and to what amount, and that any other person is indebted to such debtor and is within the jurisdiction, order that all debts owing or accru-

Fellows v. *Thornton.*

H. Y. Stanger, for the plaintiff (the judgment creditor).—It is admitted that the judgment has ceased to run by reason of the lapse of more than six years—Order XLII. rule 22. But Order XLII. rule 23 provides for leave to issue execution being given notwithstanding that six years have elapsed since the judgment. And by virtue of Order XLII. rules 6, 7, and 8, "issuing execution against any party" includes the issuing of a writ of attachment. Apart from this, the procedure of attaching debts by reason of a garnishee order may be exercised without reference to limitation of time—Order XLV. rules 1–4. Lastly, the fact that the garnishee order was irregular in so far as it included future debts did not justify the learned Judge in setting it aside *in toto*.

E. Garnet Man, for the defendant (the judgment debtor).—The garnishee order is certainly bad in so far as it purports to attach future debts. Again, it is submitted that the writ of attachment referred to in Order XLII. only relates to an attachment of the person under Order XLIV.; and rule 2 of that Order expressly provides that "no writ of attachment shall be issued without the leave of the Court or a Judge, to be applied for on notice to the party against whom the attachment is to be issued." Lastly, Order XLV. must be construed, so far as the time for making the application under rule 1 is concerned, as if the rules of Order XLII. were incorporated with it.

Lord Coleridge, C.J.—It is clear that the Registrar's order cannot be supported in so far as it purports to attach future debts, it having been expressly decided that such debts cannot be made the subject of a garnishee order (2). So far, however, as the order extends to rent which was actually due, the question arises whether the order was properly made. The debt is one which was owing to a creditor who is himself a debtor, and against whom a judgment had been recovered so long back as 1876, though no execution had issued. In October, 1884, a garnishee order was made, under the provisions of Order XLV., attaching a sum of money to which the judgment debtor was entitled in respect of certain property comprised in a settlement. Now, in my opinion, the term 'execution,' as used in Order XLII., does not include, strictly speaking, what is ordinarily called attachment of debts, but is confined by Order XLIV. to a writ of attachment attaching a person. Such a writ can only be issued on notice given to the party against whom the attachment is to be issued, and by leave of the Court; and this shews that it is a personal process. An attachment under Order XLV., which is headed "Attachment of Debts," stands in a very different position to an attachment of the person. As regards that Order, it is sufficient to observe that not a word is said about judgment, nor that a garnishee order may not be obtained notwithstanding that six years may have elapsed since judgment. It seems to me that Order XLV. stands by itself, and that rules 22 and 23 of Order XLII. apply to Order XLIV., but have no application to Order XLV. Accordingly, I think the order ought to be upheld for the sum actually due to the judgment debtor from the garnishee.

Stephen, J.—I am of the same opinion, though I confess I do not take quite the same view of the meaning of the rules as my lord does. I think that a writ of attachment includes an attachment of a debt as well as of the person. I think that Order XLII. establishes that a judgment debt may be recovered by writ of attachment as well as under Order XLV. By Order XLII. rule 8 "writ of execution" is made to include a writ of attachment, and this, as it seems to me, includes an attachment of a debt. If that be so, Order XLII. rule 23 provides for the issuing of such a writ where more than six years have elapsed since the date of the judgment. Then again, Order XLV. specifically provides for attachment of debts, and

ing from such third person (hereinafter called the garnishee) to such debtor shall be attached to answer the judgment or order; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the Court or a Judge or an officer of the Court, as such Court or Judge shall appoint, to shew cause why he should not pay to the person who has obtained such judgment or order the debt due to him from such debtor, or so much thereof as may be sufficient to satisfy the judgment or order."

(2) See *Hall* v. *Pritchett*, 47 Law J. Rep. Q.B. 15; Law Rep. 3 Q.B. D. 215.

under rule 1 of that Order an order for attachment was made notwithstanding that it was urged that the debt was more than six years old. I confess it seems to me that this case comes within the provisions of Order XLII. rule 23; at all events, it comes within Order XLV.—so that either way the debt can be attached (3).

Judgment for plaintiff.

Solicitors—Wilkins & Fanshawe, agents for G. H. Blackwell, Nottingham, for judgment debtor; Andrew Wood & Glasier, agents for H. B. Cockayne, Nottingham, for judgment creditor.

[IN THE COURT OF APPEAL.]

1885. March 11, 12. } LUND *v.* CAMPBELL.*

Practice — Costs — Reference — Costs to abide Event—Claim and Counter-claim arising out of Contract—Counter-claim exceeding Claim—Award for Balance—Event—Apportionment of Costs of Issues.

Where in an action which was referred to arbitration—costs of the cause and of the reference and award to follow the event—the amount found to be due on a counter-claim arising out of contract exceeded the amount found to be due on a claim also arising out of contract, and the arbitrator awarded that the plaintiff should pay the balance due to the defendant,—Held, *that the defendant was entitled to the costs of the cause and of the reference and award, but that the plaintiff was entitled to the costs of those issues upon which he had succeeded; and that judgment should be entered accordingly.*

Appeal by the plaintiff from an order of the Divisional Court setting aside a judgment.

The action was brought by the plaintiff, a ship-broker, to recover from the defendant, a ship-builder, commission on the price of a ship purchased by the defendant's order; and also the price of sails supplied by him to the defendant. The defendant denied his liability in respect of the plaintiff's claim, and set up a counter-claim—first, for insurance money received by the plaintiff for damage done to one of the defendant's ships; and, secondly, for the price of extra work done to a vessel which was being built by him for the plaintiff.

The claim and counter-claim were referred to arbitration upon the terms that "the costs of the cause and of the reference and award shall abide the event"; also that, "unless restrained by any order of the Court or a Judge, the party or parties in whose favour the award shall be made shall be at liberty, within seven days after service of a copy of the award on the solicitor or agent of the other party, to sign final judgment in accordance with the award, and for all costs he or they may be entitled to under this order and under the award, together with the costs of the said judgment."

The arbitrator found that upon the plaintiff's claim a sum of 822*l.* 12*s.* was due from the defendant to the plaintiff, and upon the counter-claim a sum of 919*l.* 15*s.* 5*d.* was due from the plaintiff to the defendant; and he then awarded that the plaintiff pay to the defendant the balance of 97*l.* 3*s.* 5*d.*

The plaintiff thereupon entered judgment for his costs in similar terms to those in which the judgment was entered in *Baines* v. *Bromley* (1), and which was in effect as follows: "It is adjudged that the plaintiff recover against the defendant £ , for his costs of suit, which costs were by a Master's certificate, dated the day of , allowed at £ ; and that the defendant recover against the plaintiff 97*l.* 3*s.* 5*d.* on the counter-claim, and £ for his costs of the counter-claim, which were by a Master's certificate, dated the day of , allowed at £ ."

The taxation of costs was adjourned, to enable the defendant to take out a summons to set aside the judgment.

Field, J., at chambers, dismissed the summons.

The Divisional Court (Grove, J., and Manisty, J.) reversed the decision of the

(3) *Quære*, whether the defendant had any *locus standi*; but in this case the plaintiff took no objection to his appearing to shew cause.

* *Coram* Lord Coleridge, C.J., Sir J. Hannen, and Lindley, L.J.

(1) 50 Law J. Rep. Q.B. 465; Law Rep. 6 Q.B. D. 691.

Judge, but simply made an order setting aside the judgment.

The plaintiff appealed.

J. P. Aspinall, for the plaintiff.—The question turns upon the meaning of the word "event" in the order of reference. It has the same meaning as that which was given to it in *Myers* v. *Defries* (2) and *Ellis* v. *Desilva* (3).

[*J. L. Walton* referred to *Chatfield* v. *Sedgwick* (4).]

The principle laid down in the cases is, that where a defendant sets up a counter-claim for an unascertained amount which the plaintiff could not be expected to know, the plaintiff is justified in commencing the action, and, if he succeeds upon his claim, is entitled to the costs of the cause, because the defendant has thus taken advantage of the plaintiff having been compelled to bring his action—*In re Brown*; *Ward* v. *Morse* (5) and *Stooke* v. *Taylor* (6). Here the counter-claim was of such a nature, being for an unascertained amount, that the plaintiff could not have set it off against his claim. The arbitrator having found in his favour upon the claim, he is entitled to the costs of the cause, and to enter such judgment as will give him the costs to which he is entitled.

J. L. Walton, for the defendant.—The decision of the Court below was simply based upon the ground that the judgment was wrong in form, because, as entered, the Master would be bound to tax the costs of the cause in favour of the plaintiff. The contention for the plaintiff amounts to this, that there should be two judgments, one for the defendant for the balance and costs, and the other for the plaintiff for costs. The Rules of Court do not provide any form whereby a party can enter judgment for blank costs only. The ordinary practice is for judgment to be entered for the defendant for the balance and costs, and the Master, upon taxation, will apportion the costs of those issues upon which the plaintiff has succeeded. There was no suggestion in *Ellis* v. *Desilva* (3) that the form of the judgment was wrong; the award was merely sent back to the arbitrator for the issues to be specifically found for the purposes of taxation.

Aspinall, in reply, cited *Cole* v. *Firth* (7).

Lord Coleridge, C.J.—The question here is, what is the form in which judgment should be entered upon the findings of the arbitrator. He entered upon the reference under an order of the Court by which, by consent of the parties, the costs of the cause and of the reference and award were to abide the event. The question therefore is, what is the event under this order of reference upon which the costs are to turn. On the part of the defendant it has been contended that the judgment as entered by the plaintiff is wrong. It was said that the effect of the judgment as entered would be to give to the plaintiff the general costs of the cause—and I suppose of the reference and award, because, if the event is the event of the original action, casting aside the counter-claim altogether, I can see no reason why the event should be confined to the costs of the cause. On the other hand, it was said that it had been decided by the Court of Appeal in *Baines* v. *Bromley* (1)—which decision is binding upon us—that where the plaintiff brings an action for a liquidated sum, but the defendant, instead of contenting himself with pleading a set-off and succeeding on that defence, also sets up a counter-claim, the defendant would in the first case, but not in the second, be entitled to the costs of the cause. It appears to me that nothing of the kind was there decided. It is true that the judgment in that case was *mutatis mutandis* in the same form as this judgment, but it is also true that no application was there made to set aside the judgment or to reform it, and the Court was merely asked to say whether the taxation under the words of that judgment was a proper taxation. The taxation in that case seems to have

(2) 49 Law J. Rep. Exch. 266; Law Rep. 5 Ex. D. 180.
(3) 50 Law J. Rep. Q.B. 328; Law Rep. 6 Q.B. D. 521.
(4) 48 Law J. Rep. C.P. 274; Law Rep. 4 C.P. D. 457.
(5) 52 Law J. Rep. Chanc. 524; Law Rep. 23 Ch. D. 377.
(6) 49 Law J. Rep. Q.B. 857; Law Rep. 5 Q.B. D. 569.
(7) Law Rep. 4 Ex. D. 301*n*.

had the effect which I have pointed out; but the answer is, that in order to have avoided that consequence the judgment should have been challenged; but it was not —whilst here it is. When the judgment of the Court is looked at, especially that of Lord Justice Brett (8), it will be found— although it is to be treated as a *dictum*— that, in his opinion, where in a case of this sort there is a claim arising out of contract, and also a counter-claim arising out of contract the amount of which exceeds that of the claim, the defendant is entitled to the general costs of the cause and the costs of the reference and award, but that the plaintiff is entitled to set off against those costs the costs of those issues upon which he has succeeded. We were also pressed with an authority, to which I defer, as having decided that where there is an order of reference of this kind, the word "event" is to be read distributively, and does not mean the single event of the arbitration, so that all the costs would follow that single event without being distributed. The event, however, means this, that if the arbitrator ascertains the various issues, some in favour of the plaintiff and some in favour of the defendant, the party who succeeds upon the whole will be entitled to the general costs of the cause, and the unsuccessful party to the costs of those issues upon which he has succeeded. The justice of that is very ably pointed out in the judgment of Lord Chief Justice Cockburn, with which I entirely agree, in *Stooke* v. *Taylor* (6). I entirely agree that parties who succeed should have their costs in proportion to their success. First of all, a party who in an action of this sort succeeds upon the whole is entitled to the general costs of the cause; but the word "event" is to be read distributively, and the unsuccessful party is to have the costs of those issues upon which he has succeeded. Now what is the event here? It is true there is a claim and a counter-claim, and that there may be a very substantial difference between a set-off and a counter-claim: and it is also true, as was said by Lord Justice Cotton in *In re Brown; Ward* v. *Morse* (5), that a defendant may get an advantage by setting up a counter-claim; still in this case there has been but one trial or examination by the arbitrator of two sides of an account, which has resulted in a balance being found in favour of the defendant, and that balance is the only amount which the arbitrator has awarded to be paid. No doubt he also found that the other sums which were justly claimed by the plaintiff were to be allowed, and that up to the time of the making of the award the defendant was still indebted to the plaintiff: also that the plaintiff was indebted to the defendant in other sums; but he only awards that the balance due from the plaintiff to the defendant shall be paid to the defendant. That seems plainly to me to be the event of the arbitration which the costs of the cause and of the reference and award are to follow. It is, however, plain that upon the judgment as entered the plaintiff would get those costs; but that must be wrong, because it would give him costs to which he is not entitled. It would not be quite right to set aside this judgment *simpliciter*, as I understand was all that the Divisional Court did, for the defendant might then enter judgment as he thought fit. It is just possible that he might do so in a form prejudicial to the plaintiff. The proper way in which to reform this judgment is to enter it for the defendant for the balance with the costs of the cause and of the reference and award, the plaintiff to be allowed upon taxation the costs of those issues upon which he has succeeded. That seems to me to be the justice of the case, and I am not conscious that we are interfering with anything that has been expressly decided either in this Court or elsewhere. In this case and upon these words this is the true meaning of the agreement between the parties.

(8) 50 Law J. Rep. Q.B. at p. 465; Law Rep. 6 Q.B. D. at p. 694.

SIR JAMES HANNEN.—I have nothing to add upon this view of the case. I only wish to say I think that the Court below did not take a right view in merely setting aside this judgment, and that the alteration which has been suggested should be made.

LINDLEY, L.J.—I also think that this judgment should be substantially altered. The present decision will not in any way

Lund v. *Campbell, App.*

conflict with *Baines* v. *Bromley* (1) and *Ward* v. *Morse* (5). In both those cases the judgments were entered, and the only questions there were whether the costs had been taxed in accordance with the judgments as entered. But the question here is, how is the judgment to be entered. The case was referred to arbitration—costs of the cause and of the reference and award to abide the event, and the party in whose favour the arbitrator should decide to be at liberty to enter judgment for such costs as he might be entitled to. The word "event" has given rise to a good deal of controversy. It was said here that it means the sum found for the defendant. But that is not quite true, for, although a sum is found in his favour, he has failed upon certain material issues; and when the same point was raised in *Ellis* v. *Desilva* (3) Lord Justice Bramwell sent the award back because the arbitrator had not found the issues specifically, and he declined to give the general costs of the action to the defendant without discriminating between the issues upon which he had succeeded and those upon which he had failed. We had some little doubt how the Master would tax the costs under a judgment simply for the defendant for the balance with costs, and we have therefore inserted the words which have been suggested by the Lord Chief Justice. Upon this order of reference we are acting in conformity with a long series of cases—namely, *Chatfield* v. *Sedgwick* (4), *Stooke* v. *Taylor* (6), and *Ellis* v. *Desilva* (3)—and also with *Lowe* v. *Holme* (9), which was not cited. The judgment will therefore be entered for the defendant for the balance, with the costs of the cause and of the reference and award; but it ought also to go on to say that the defendant is to pay the costs of those issues upon which the plaintiff has succeeded.

Judgment varied.

Solicitors—Lowless & Co., for plaintiff; J. E. & H. Scott, agents for G. Armstrong & Sons, Newcastle-on-Tyne, for defendant.

(9) 52 Law J. Rep. Q.B. 270; Law Rep. 10 Q.B. D. 286.

1885. March 13. } HOPKINSON *v.* CAUNT AND OTHERS.

Coal Mine — Check-weigher — Person employed in the Mine—Coal Mines Regulation Act, 1872 (35 *&* 36 *Vict. c.* 76), *s.* 18.

By 35 *&* 36 *Vict. c.* 76. *s.* 18, *persons employed in a coal mine may at their own cost station a check-weigher at the place for weighing the coal, who "shall be one of the persons employed either in the mine at which he is so stationed, or in another mine belonging to the owner of that mine":*— Held, *that the check-weigher must be in the employment of the mine-owner at the time of his election to the office.*

The plaintiff was in February, 1883, *stationed as check-weigher by the men employed in a mine, he being at the time in the employment of the owner of the mine. He continued to act as check-weigher up to the* 30*th of July*, 1884, *when he received fourteen days' notice from the men to discontinue his employment. This notice was given because the men intended to reduce the check-weigher's wages from* 35*s. to* 30*s. a week. Before the expiration of the notice the men held an election for the office of check-weigher, when the plaintiff was again elected:*—Held, *that the plaintiff was not qualified for re-election because not "employed in the mine" within the meaning of the above Act, and that the owner was therefore justified in preventing him from acting as check-weigher.*

Appeal from the decision of the County Court Judge at Nottingham under section 6 of the County Courts Act, 1875 (38 & 39 Vict. c. 50).

An action for assault was brought by the plaintiff under the following circumstances:—

On the 23rd of February, 1883, the plaintiff was stationed as check-weigher by the men employed at a coal mine owned by the Wollaton Colliery Company. It was admitted that on the above date he was employed in the mine by the company, and that he was stationed as the men's check-weigher, under the provisions of 35 & 36 Vict. c. 76. s. 18 (1), to act as check-

(1) 35 & 36 Vict. c. 76. s. 18: "The persons who are employed in a mine to which this Act

weigher until the 30th of July, 1884, when he received fourteen days' notice from the men to determine his employment. This notice was given because the men intended to reduce the check-weigher's wages from 35*s.* to 30*s.* per week, and the plaintiff was informed in the notice that he was eligible for re-appointment at the reduced rate of wages. On the 11th of August the men held an election for the office of check-weigher; six candidates presented themselves, and the plaintiff was again elected. The notice to quit given to the plaintiff expired on the 13th of August, and he continued to act as check-weigher up to that day and also on the 14th. When, however, he attended on the morning of the 15th he was forcibly prevented by the defendants from entering the machine house where he had to be stationed to perform his duties of check-weigher. The defendants were men employed by the mine-owners, the Wollaton Colliery Company, and acting under their orders, and it was admitted that they used no more force than was necessary to prevent the plaintiff entering the machine house.

Upon these facts the learned County Court Judge gave judgment for the plaintiff, and assessed the damages at 20*s.*

The defendants obtained a rule calling upon the plaintiff to shew cause why this judgment should not be set aside and judgment entered for the defendants.

Atherley Jones shewed cause. — The plaintiff was continued in his employment, and there never was any determination of his service.

[MATHEW, J.—It must be taken there was a re-election.]

He was then properly elected. The statute requires only that he must be a person employed in the mine in order to prevent the men introducing a stranger. It is not necessary that the person appointed should be employed by the owner. The object of the section is fulfilled when, as in this case, the owner has the opportunity of a veto in the original election.

Sir H. Giffard, Q.C. (*Appleton* with him), in support of the rule.—The plaintiff was not at the time of the election qualified for the appointment. An employment by the men is insufficient; he must be employed by the owner. This condition would apply to a re-election. It was the object of the Legislature not to allow the men to appoint any one check-weigher who was not in the employment of the owner.

MATHEW, J.—The question before us turns upon the interpretation of section 18 of 35 & 36 Vict. c. 76. On the facts presented to us it is impossible to come to any other conclusion but that the plaintiff's appointment was terminated, and that there had been a fresh election. It becomes necessary therefore to shew that at the time of his re-election he was a qualified person. The 1st paragraph of section 18 seems to allow of an unqualified election, but the 2nd paragraph enacts that the check-weigher is to be one of the persons "employed at the mine, or in another mine belonging to the owner of that mine," and we have to determine the meaning to be placed on those words. I cannot have any doubt but that the use of the word "employed" in this section involves the addition of the words "by the owner," and that the sentence means that the person appointed is to be in the employment of the owner of the mine. The Legislature has evidently considered that it would be a reasonable stipulation on the part of the owner of a mine that the men's check-weigher should be one of the persons employed by him. The plaintiff was not at the time of his election employed by the owner, and consequently the judgment entered for him must be set aside, and judgment entered for the defendants.

SMITH, J.—The point is, whether the men's check-weigher must be a person employed by the owner at the time of his election. The 1st paragraph of the section applies to the persons who are to make the election; the 2nd paragraph

applies, and are paid according to the weight of the mineral gotten by them, may, at their own cost, station a person (in this Act referred to as 'a check-weigher') at the place appointed for the weighing of such mineral, in order to take an account of the weight thereof on behalf of the persons by whom he is so stationed.

The check-weigher shall be one of the persons employed either in the mine at which he is so stationed, or in another mine belonging to the owner of that mine."

describes the persons from whom the election is to be made. The check-weigher must be one of the persons employed at the mine. Employed by whom? Obviously by the owner. According to the true interpretation of this section the check-weigher can only be appointed from the body of men who at the time are in the employment of the mine-owner. When in February, 1883, the plaintiff was appointed check-weigher, he ceased to be in the employment of the mine-owner, he obtained new wages, he served new masters, and the mine-owner ceased to be able to discharge him—he thenceforward was employed by the men. It has been urged before us that he never discontinued his employment as check-weigher; but such a contention cannot be maintained. The facts shew that he received fourteen days' notice, and that a fresh election took place, at which he was re-elected. I also therefore come to the conclusion that the decision of the County Court was erroneous.

Judgment for defendants.

Solicitors—Hickin & Graham, agents for W. J. Clegg & Sons, Sheffield, for plaintiff; Taylor, Hoare & Co., agents for Hunt & Williams, Nottingham, for defendant.

1884. Dec. 18.

FORD v. HOAR.

Parliament—Parliamentary and Municipal Registration Act, 1878 (41 & 42 *Vict. c.* 26), *s.* 28, *sub-ss.* 1, 12, *and* 13—*Mistake of Overseers — Omission of Qualifying Premises—Barrister's Power to Amend—Change in Description of Qualification.*

The respondent had occupied during the whole qualifying period three houses in immediate succession. The overseers, by mistake, omitted to specify one of the houses in the description of the qualifying property, and the part only of the qualifying property as it appeared on the list was insufficient to give a vote:—Held (*by* STEPHEN, J., *and* CAVE, J.; *dissentiente* LORD COLERIDGE, C.J.), *that the mistake was one which it was the duty of the Revising Barrister to have amended under the provisions of* 41 & 42 *Vict. c.* 26. *s.* 28, *by inserting the description of the omitted house.*

Case stated by the Barrister appointed to revise the list of voters for the city of Exeter.

At a Revision Court held at Exeter on the 15th of September, 1884, the respondent's name appeared in the list of voters for the parish of St. Thomas the Apostle as the occupier of dwelling-houses in succession, and the entry and description on the said list was as follows:—

Name of Voter	Place of Abode	Nature of Qualification	Nature and Situation of Qualifying Property
Hoar, William	34 Prospect Place, Cowick Street	Dwelling-houses in succession	44 Oxford Street, and 34 Prospect Place, Cowick Street

The appellant duly objected to the name of the respondent being retained on the said list, upon the ground (*inter alia*) that the respondent had not been in occupation of the premises as described therein for the period and at the time required by law to give him a vote.

It was proved that the respondent had occupied during the whole qualifying period three houses in immediate succession—namely, 44 Oxford Street, and 31 and 34 Prospect Place, Cowick Street—and his occupation of those three houses and not of the two houses only which are specified on the list gave him a complete qualification of the nature specified on the third column of the list. The overseers well knew that the respondent had occupied the house 31 Prospect Place, Cowick Street, between his occupation of 44 Oxford Street and his present house 34 Prospect Place, and that there had been immediate successive occupation, but they accidentally, and by mistake, omitted to specify the intermediate house, 31 Prospect Place, in the description of the qualifying property, and the part only of the qualifying property as it appeared on the list was insufficient to give the vote.

Upon proof of the above facts, the Re-

vising Barrister was asked on behalf of the respondent to amend the fourth column of the list by striking out the figures 44 and 34 respectively, and to retain the name of the respondent in respect of his qualification which consisted of his occupation of the three houses as above stated.

It was contended by the appellant that there was no power to amend, as the Barrister by so doing would be making the qualification of the respondent to consist of an occupation of three houses in succession instead of only two as specified in the list.

The Revising Barrister decided that he had the power under the 28th section of the Parliamentary and Municipal Registration Act, 1878, to make the amendment as requested, and struck out the figures 44 and 34 in the fourth column of the list, and received proof of the successive occupation by the respondent of the said three houses, being of opinion that by so doing he was not altering the nature of the qualification inserted on the list, nor the situation of the qualifying property, but merely correcting an omission accidentally and by mistake made by the overseer in making out the list; accordingly the respondent's name was retained on the list of voters (1).

If the Court was of opinion that the Revising Barrister's decision was wrong, the register was to be amended by striking out the respondent's name from the list.

Bompas, Q.C., for the appellant.—This is a change in the description of a qualification as it appears in the list which a Revising Barrister is not at liberty to change—see 41 & 42 Vict. c. 26. s. 28, sub-s. 1 and 13 (1). If the Barrister were held to be at liberty to insert additional houses in the fourth column, no fair opportunity would be given to an objector to challenge the correctness of the voter's amended qualification. In *Bartlett* v. *Gibbs* (2) it was expressly decided that an amendment of this kind could not be made.

[CAVE, J.—That case was decided under 6 Vict. c. 18. s. 40, where the power of amendment was less extensive than it is under the Act of 1878.]

Porrett v. *Lord* (3) was decided under the last-mentioned Act, and it was there held that where one of the houses was omitted in the fourth column the Barrister had no power to supply it. As to what mistakes the Barrister has power to amend, see *Adams* v. *Bostock* (4), *James* v. *Howarth* (5), and *Pickard* v. *Baylis* (6). Then, again, even if the Barrister had power to amend, such power was not properly exercised by striking out the number, which the Act expressly provides should be given—see note *p* to Act of 1878.

John Rose, for the respondent. — A general power of amendment is given by section 26, sub-section 1, in case of mistakes proved to have been made in a list. Sub-section 13 only applies to a case not otherwise provided for, and cannot therefore affect the present amendment.

[LORD COLERIDGE, C.J.—I am unable

(1) By 41 & 42 Vict. c. 26. s. 28, a Revising Barrister shall, with respect to the list of voters for a Parliamentary borough and the burgess list for a municipal borough which he is appointed to revise, perform the duties and have the powers following:—

Sub-section 1: "He shall correct any mistake which is proved to him to have been made in any list."

Sub-section 12: "Where the matter stated in a list or claim, or proved to the Revising Barrister in relation to any alleged right to be on any list, is in the judgment of the Revising Barrister insufficient in law to constitute a qualification of the nature or description stated or claimed, but sufficient in law to constitute a qualification of some other nature or description, the Revising Barrister, if the name is entered in a list for which such true qualification in law is appropriate, shall correct such entry by inserting such qualification accordingly, and in any other case shall insert the name with such qualification in the appropriate list and shall expunge it from the other list (if any) in which it is entered."

Sub-section 13: "Except as herein provided, and whether any person is objected to or not, no evidence shall be given of any other qualification than that which is described in the list or claim, as the case may be; nor shall the Revising Barrister be at liberty to change the description of the qualification as it appears on the list, except for the purpose of more clearly and accurately defining the same."

(2) 1 Lutw. 73; 5 Man. & G. 81.

(3) 49 Law J. Rep. C.P. 177; Law Rep. 5 C.P. D. 65.

(4) 51 Law J. Rep. Q.B. 175; Law Rep. 8 Q.B. D. 259.

(5) 49 Law J. Rep. C.P. 169; Law Rep. 5 C.P. D. 225.

(6) 49 Law J. Rep. C.P. 182; Law Rep. 5 C.P. D. 235.

to distinguish this case from *Bartlett* v. *Gibbs* (2), and you had better confine your observations to that point.]

Bartlett v. *Gibbs* (2) was decided under the Act of 1843, and, as has been pointed out, the power of amendment under that statute is less extensive than it is under 41 & 42 Vict. c. 26. In *Bartlett* v. *Gibbs* (2), moreover, the question mainly turned on the third column, the qualification stated being "house," whereas the proper qualification should have been "houses in succession." He referred also to *Hitchens* v. *Brown* (7) and *Flanders* v. *Donner* (8).

CAVE, J.—I am of opinion that this appeal must be dismissed, inasmuch as the case comes within the plain language and meaning of the Act of 1878. The recital of that Act is, "An Act to amend the law relating to the registration of voters in Parliamentary boroughs, and the enrolment of burgesses in municipal boroughs, and relating to certain rights of voting and proceedings before and appeals from Revising Barristers"; and unquestionably it does correct some of the decisions of the Court of Common Pleas upon previous enactments. The 28th section commences by expressly enacting that the Revising Barrister "*shall* correct any mistake proved to him to have been made in any list"; and it seems to me that this was clearly a mistake made in a list, and that therefore the Barrister was bound to correct it unless the duty, or rather the power imposed upon him in this respect, is cut down. For that purpose we are referred to sub-section 13, which enacts that, "except as herein provided, and whether any person is objected to or not, no evidence shall be given of any other qualification than that which is described in the list or claim, as the case may be; nor shall the Revising Barrister be at liberty to change the description of the qualification as it appears in the list except for the purpose of more clearly and accurately defining the same." Now I observe that this sub-section commences, "except as herein provided," which, I take it, means, except in cases provided by the previous sub-sections no change in the qualification is to be made. The 13th sub-section therefore in no way interferes with the operation of sub-section 1. It has been contended that the words in sub-section 13 should be taken to refer only to sub-section 12; but that does not seem to me to be the natural meaning of the words, and I am certainly quite unable to reconcile such a construction with the provisions of section 24, which enable a voter to make a declaration to cure a misdescription of his qualification, and compels the Barrister to receive the declaration as evidence of the facts declared. Now, if there is no power to make an alteration of this kind, what is the use of a voter making a declaration and running the risk of incurring the penalties provided by section 25? It appears to me that section 24 applies to mistakes in a list, and section 28 also, and that the provisions of section 24 throw valuable light on section 28, sub-section 1, and shew that the intention of the Legislature was that mistakes of this kind should be set right, particularly when, as here, the mistake arose through the default of the overseers. The only difficulty arises from the case of *Bartlett* v. *Gibbs* (2), a decision which ought undoubtedly to be treated with respect. But *Bartlett* v. *Gibbs* (2) was decided under a previous Act, where the language is not identical; for the 6 Vict. c. 18. s. 40 "provided that the Barrister should not be at liberty to change the description of the qualification except for the purpose of more clearly and accurately defining the same," whereas the 13th sub-section of section 28 of the Act of 1878, so far from being a proviso to sub-section 12, expressly excepts the whole section from its operation. And this further observation may be made, that nowhere in the Act of 1843 is there a similar proviso to that contained in section 24 of the Act of 1878; and, when we find section 24 expressly providing for an easy method of correcting mistakes in the description of qualifications, then it follows that the power to correct must apply to mistakes, and not solely to cases which may be amended under sub-section 12. As I read sub-section 12 it has regard to the fact that, besides mistakes of overseers, there may be other mistakes by a claimant in describing his qualification, as, for example, "workshop," whereas his qualification should

(7) 2 Com. B. Rep. 25.
(8) 15 Law J. Rep. C.P. 81.

be "warehouse." In such case the section provides for amendment, although the mistake was made by the claimant and not by the overseers. It seems to me, therefore, that the decision in *Bartlett* v. *Gibbs* (2) has no application here, and that the decision of the Barrister was correct. I do not, however, agree that he was at liberty to strike out numbers. His proper course would have been to insert 31 Prospect Place; yet, as the result would have been the same, I think the appeal should be dismissed.

STEPHEN, J.—I am of the same opinion.

LORD COLERIDGE, C.J.—I entertain very considerable doubt in this matter. If this were necessarily a Court of ultimate appeal I should feel at liberty to disregard the decision of the Court of Common Pleas, if I thought it was clearly wrong. But where our decision is not conclusive, it is far more important to adhere to a previous decision, and I frankly confess I am unable to distinguish this case from the decision arrived at in *Bartlett* v. *Gibbs* (2), where it was held that where a claim was for houses in immediate succession, only one house being mentioned, the description could not be amended by inserting the other in the fourth column of the overseers' list; for that would be a change in the description of the qualification beyond "the more clearly and accurately defining the same." What is true as to two houses is true for three or more; and if it be necessary, where the claim is for two houses, that both should be stated, it follows that where the claim is for three houses all should appear in the fourth column. Now, the omission in the present case being a clear mistake, the question arises whether the mistake is one which can be corrected. The opinion I have formed is one which I regret, but it seems to me that it is in strict accordance with the most recent decision of the Registration Court, composed of four Judges of very great learning. It seems to me that the duty imposed, and the limitation of the power as to correcting mistakes under the Acts of 1843 and 1878, are the same, notwithstanding that there is some slight difference in the language used.

I do not forget the argument derived from sub-section 12; but it appears to me that section 24, which does not occur in the Act of 1843 at all, and sub-section 12 of the later Act, may be limited to the subject-matter with which they deal, and that the 24th section may, and ought, in my opinion, to be confined to cases coming within the 12th sub-section.

If therefore the decision in *Bartlett* v. *Gibbs* (2) is applicable, as I think it is, I am unable to see that the case is in any way affected by its being under the earlier statute. The decision of the Revising Barrister was therefore, in my judgment, erroneous; but, inasmuch as my two brother Judges are of a contrary opinion, this appeal will be dismissed.

Appeal dismissed. Leave to appeal granted.

Solicitors—J. E. Fox & Co., agents for H. & B. J. Ford, Exeter, for appellants; S. Hamilton, agent for J. W. Friend, Exeter, for respondent.

1884. Dec. 18. } BLOSSE (*appellant*) *v.* WHEATLEY (*respondent*).

Parliament—Borough Vote—Description of Qualification—Power of Amendment—Change in Qualification—41 & 42 *Vict. c.* 26. *s.* 28, *sub-ss.* 12 *and* 13.

In the overseers' list for the borough of C. the nature of the appellant's qualification was wrongly described as "offices successive occupation," and the qualifying property as situated in "High Street and Charles Street," whereas the appellant had occupied one set of premises only during the whole of the qualifying period in respect of which premises he was qualified to vote:—Held, *that the misdescription was one which the Barrister should have amended under* 41 & 42 *Vict. c.* 26. *s.* 28, *by striking out the words "successive occupation" in column* 3, *and the words "and Charles Street" in column* 4.

Case stated by the Barrister appointed to revise the list of voters for the borough of Cardiff.

At a Court held for the borough of Cardiff on the 25th of September, 1884, for the revision of the lists of voters for

the said borough, Evan Thomas duly objected to the appellant's name being retained in the Parliamentary and Municipal list of voters (division 1) for the parish of St. John the Baptist, West Ward, in the said borough.

The name of the appellant appeared in the said list as under:—

No.	Name of voter in full, surname being first.	Place of abode.	Nature of qualification.	Name and situation of qualifying property.
48.	Blosse, Harry Francis Lynch	Gabalva House, Cathedral Road.	Offices successive occupation.	High Street and Charles Street.

It was proved that during the whole of the qualifying year the appellant had occupied one only of the said specified offices —namely, that in High Street—and would have had by reason of such occupation a good and sufficient qualification had it been so described on the said list.

It was further proved that the misdescription occurred solely through the overseers of the said parish erroneously believing that the appellant had occupied an office in Charles Street during the latter part of the qualifying year, and that he had not continued in uninterrupted occupation in High Street (as the fact was) during the whole of the said period. Acting on this erroneous impression, they by the said mistake so described the qualifying property as it appeared on the said list.

The appellant had not sent in any declaration for correcting misdescriptions under 41 & 42 Vict. c. 26. s. 24, nor had he made any claim to have his name inserted in the said list in respect of his occupation during the whole of the qualifying year of the said office in High Street only.

The Barrister was thereupon asked to amend the description in the third and fourth columns by striking out the words "successive occupation" in the third column, and also by striking out the words "and Charles Street" in the fourth column.

The Barrister was of opinion that to make the required amendments would be to make a change in the description of the qualification which he was not at liberty to make, and he therefore held the objection fatal, and declined to amend. The name was accordingly expunged by him from the said list of voters.

The appellant having thereupon given due notice of appeal against this decision, the above Case was stated for the opinion of the Court.

If the Court should be of opinion that the Revising Barrister's decision was right, the said list of voters was to remain as revised by him. If the Court should be of opinion that his decision was wrong, then the names of the appellant Harry Francis Lynch Blosse was to be restored in the list with or without amendment, as the Court should think fit.

McConnell, for the appellant, was stopped by the Court.

Brynmor Jones, for the respondent.—*Porrett* v. *Lord* (1) is an authority to shew that an amendment of this kind cannot be made by a Revising Barrister. Section 26, sub-section 12, has no application to a case where the matter sought to be amended is in the fourth column.

Lord Coleridge, C.J.—I feel no difficulty here in holding that the amendment asked for ought to have been made. It seems to me clear that the case falls distinctly within the provisions of sub-section 12.

Stephen, J.—I am of the same opinion, and only desire to add that *Ford* v. *Hoar* (2) goes far beyond this.

Cave, J., concurred.

Appeal allowed.

Solicitors—Gosling & Co., agents for H. F. Lynch Blosse, for appellant; E. Andrew, agent for J. L. Wheatley, Cardiff, for respondent.

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(1) 49 Law J. Rep. C.P. 176; Law Rep. 5 C.P. D. 65.

(2) *Ante*, p. 286.

[IN THE COURT OF APPEAL.]

1885. Jan. 14, 15. LINE AND OTHERS (*petitioners*) *v.* WARREN, CHECKLEY, AND BROMWICH (*respondents*).*

Municipal Election—Allowance of Objections to the Nominations of some Candidates—Right to petition against Return of some of those elected—Practice—Right of Appeal—Municipal Corporations Act, 1882 (45 & 46 *Vict. c.* 50), *ss.* 87, 93, *sub-s.* 7, *and* 242, *sub-s.* 3; *schedule III. part II. rule* 14—*Judicature Act*, 1881 (44 & 45 *Vict. c.* 68), *s.* 14.

Under rule 14 *of schedule III. part II. of the Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *the decision of a mayor in allowing objections to the nominations of some of the candidates at a municipal election is subject to an appeal either by a petition questioning the whole election, or by one or more petitions questioning the return of any one or more of the candidates who were elected. If the latter course is adopted, the Court can declare the return of the particular respondent or respondents to be void, without invalidating the election of the persons elected against whom no petition has been presented.*

The decision of the Queen's Bench Division affirmed.

An appeal lies by leave of the High Court from a decision of that Court upon a municipal election petition.

Appeal by three persons, named Warren, Checkley, and Bromwich, from a decision of the Queen's Bench Division upon a Special Case stated under section 93, sub-section 7, of the Municipal Corporations Act, 1882. By the judgment of the Queen's Bench Division the election of the appellants as town councillors for the borough of Daventry was declared to be null and void.

The case is reported *ante*, p. 146.

In October, 1883, there were four vacancies in the town council of Daventry, and, in pursuance of a notice of an election of town councillors, nine candidates (including the three appellants) were nominated. Objections were raised to the nomination papers of four of the candidates—namely, Thomas Harris, John Merrifield, Charles Rodhouse, and John Edward Rodhouse—on the ground that the persons subscribing them had also subscribed the nomination papers of other candidates. The objection to Harris's nomination was withdrawn, but the mayor allowed the objections in the other three cases, although no burgess had subscribed more than one nomination paper for any single candidate, or more nominations than there were vacancies. Accordingly six candidates only went to the poll, and at the election, which was held upon the 24th of October and the 1st of November, 1883, the three appellants and Harris were declared to be duly elected. Thereupon a petition was presented under section 87 of the Municipal Corporations Act, 1882 (1), by the respondents to this appeal, alleging that the mayor ought not to have allowed the objections, and that the same were bad in law, and praying that the election of the appellants might therefore be declared null and void. Harris was not made a respondent to this petition, which was presented against the present appellants only, no proceedings being taken to invalidate Harris's election.

The Queen's Bench Division held that it was open to the petitioners to question the return of the appellants without disturbing the election of Harris, and that the mayor's decision in allowing the objections was erroneous (2).

From that decision Warren, Checkley, and Bromwich, having obtained the leave of the Queen's Bench Division, now appealed.

Y. Anderson and *Shearman*, for the petitioners, raised a preliminary objection to the hearing of the appeal on the ground that by 45 & 46 Vict. c. 50. s. 93, sub-s. 7, the cases raised by a petition may be, by direction of the Court, stated in a Special Case, and the decision of the High Court on such case is to be final.

* *Coram* Brett, M.R., Cotton, L.J., and Lindley, L.J.

(1) 45 & 46 Vict. c. 50.

(2) An application had previously been made to a Judge in chambers to strike the petition off the file on the ground that Harris ought to have been made a respondent. The application was dismissed, and that decision was affirmed by the Queen's Bench Division. Upon appeal to this Court the decision of the Divisional Court was affirmed.

Line v. *Warren, App.*

Lewis Coward, for the appellants.—In this case the Court below gave special leave for an appeal to this Court under section 14 of the Judicature Act, 1881 (3), and the effect of section 242, sub-section 3, of the Municipal Corporations Act, 1882 (1), is to incorporate the provisions of the first-mentioned Act.

BRETT, M.R.—The appeal must be heard.

Lewis Coward, for the appellants.—Even admitting that the mayor's decision was wrong, still it is contended that the Court below had no power to declare the election void as to three of the elected candidates only, because the ground of the petition was a matter which went to the root of the whole election; *non constat* that four other persons would not have been elected if the mayor had acted differently. But the Court could not declare the whole election void, because Harris, who was the fourth elected candidate, was not made a respondent to the petition, and they could not in his absence declare his election to be void. In every case that has occurred hitherto, all the persons interested have been before the Court. An election may be divisible where the petition is grounded upon personal disqualifications, such as corrupt practices; but the present is an entirely different case, and therefore the Queen's Bench Division was not justified in pronouncing that the election was partially invalid.

Howes v. *Turner* (4) and *Budge* v. *Andrews* (5) were cited.

Y. Anderson and *Shearman, contra*, were not called upon.

BRETT, M.R.—In this case, at an election of town councillors for the borough of Daventry four candidates were declared to be elected. There were other candidates who might and ought to have been allowed to go to the poll, but to whose nomination papers objections were wrongly allowed by the mayor. That gave a right to question the whole election, or the return of those persons who were elected, and that right is given to the burgesses of the borough. The present petition was only presented against three of the elected candidates, but it was open to any of the other burgesses to petition against Harris, the fourth person elected. It is therefore, in the circumstances of this case, no injustice that Harris's election should stand good, for no objection has been raised to his return, and, so far as appears from the facts before the Court, it may even be that every one of the electors is willing that Harris should retain his seat. Here the petition was presented under rule 14 of schedule III. part II. to the Municipal Corporations Act, 1882 (1). That rule provides that the decision of the mayor in allowing an objection to a nomination paper "shall be subject to reversal on petition questioning the election or return." Questioning the election must mean questioning the whole election, and questioning the return must mean questioning the return of any particular person who is elected. The form which the petition takes in the present case is clearly that of a petition against the return of the three appellants, and not against the election as a whole. The argument for the appellants comes to this: that it is not possible to question the return of A, although it is admitted that it is bad, because the return of B and C, who were returned at the same time, has not been questioned. But where is that said in the Act? And why should the appellants be entitled to say that their return cannot be questioned because that of Harris is not questioned? If one were at liberty to say so, I think it is clear that Harris's election was bad; but we have no right to express an opinion one way or the other, because he is not before us. The cases cited on behalf of the appellants are not in point, because in them all the persons elected were before the Court. This appeal must be dismissed, with costs.

COTTON, L.J.—I am of opinion that the judgment of the Court below was right. From a perusal of the provisions of the Municipal Corporations Act, 1882 (1), I think it is apparent that "return," as used in rule 14 of schedule III. part II., means the return of any one person; whilst

(3) 44 & 45 Vict. c. 68.
(4) 45 Law J. Rep. C.P. 550; Law Rep. 1 C.P. D. 670.
(5) 47 Law J. Rep. C.P. 586; Law Rep. 3 C.P. D. 510.

"election" means the election as a whole. The Act evidently makes this distinction in some cases, for the provisions as to corrupt practices can refer only to the conduct of the person implicated in such practices. The present case seems to me to fall under section 87, sub-section 1 (*d*), which provides that a person's election may be questioned on the ground "that he was not duly elected by a majority of lawful votes." Under this provision any person whose election is questioned may be made a respondent to an election petition, and there may be a separate petition against each person elected. It is therefore clear that the Act contemplates the questioning of a particular return as well as of a whole election. It was said on behalf of the appellants that the return of Harris cannot be questioned without bringing him before the Court. That is so. But here the petitioners do not try to set aside the whole election; that is not the form of order which would be made on such a petition. Here there was an objection which was fatal to the validity of the election of three persons. Can it be said that the Court ought to abstain from pronouncing upon the objection because another person who was elected is not before them? I think not; and I am therefore of opinion that the decision of the Queen's Bench Division must be affirmed.

LINDLEY, L.J.—I am of the same opinion. It is only necessary to study the provisions of sections 87 and 91 of the Municipal Corporations Act, 1882, to see that it contemplates the questioning of a particular return as well as of a whole election. Here the petitioners did not wish to question Harris's return, and they therefore left it to his opponents to do so if they thought fit: for under section 88 of the Act any four or more persons who had a right to vote may present an election petition.

Appeal dismissed.

Solicitors—Kingsford, Dorman & Co., agents for Burton & Willoughby, Daventry, for appellants; Caister & Shearman, for petitioners.

[IN THE COURT OF APPEAL.]

BANKRUPTCY. 1884. Oct. 31. } *Ex parte* WALLACE; *in re* WALLACE.*

Bankruptcy — Bankruptcy Petition — Power of Attorney to sign on behalf of his Principal—Bankruptcy Rules, 1883, *rule* 125—*Appendix, Form* 10.

A bankruptcy petition signed by an attorney on behalf of his principal, is sufficiently signed provided that the power under which the attorney acts is wide enough to confer upon him the necessary authority.

A power "to commence and carry on, or to defend, at law or in equity, all actions, suits, or other proceedings in which I or my property may be in anywise concerned" was held to confer such authority.

This was an appeal against a receiving order which had been made against Wallace by Mr. Registrar Brougham.

The bankruptcy petition on which the order was made was presented on the 18th of August, 1884, by William Richards, of Prince Edward's Island, and was signed "William Richards, by his attorney Thomas Picton Richards."

In signing the petition Thomas Picton Richards acted under a power of attorney executed by William Richards on the 8th of February, 1879. The power contained a recital that William Richards was possessed of certain ships, vessels, and other property, and that he had occasion from time to time to transact business in England, where some of his property was situated, and that he was desirous of appointing an attorney to manage his affairs and business, and by the deed he appointed T. P. Richards to be his attorney in his name and on his behalf, "to commence and carry on, or to defend, at law or in equity, all actions, suits, or other proceedings touching anything in which I or my ships or other personal estate may be in anywise concerned." The question was, whether the bankruptcy petition was sufficiently signed by the petitioner, having

Coram Baggallay, L.J., Bowen, L.J., and Fry, L.J.

regard to rule 125 of the Bankruptcy Rules, 1883, and Form No. 10 in the Appendix.

F. Cooper Willis, for the appellant.

R. Vaughan Williams, for the creditor, was not heard.

BAGGALLAY, L.J. (after stating the facts).—The question is, whether the signature of a bankruptcy petitioner by an attorney on behalf of the petitioner is a sufficient signature. I can entertain no doubt whatever that it is, provided that the power of attorney authorises the signature; and I am satisfied that the words of the power in the present case were sufficient to authorise T. P. Richards to sign the petition on behalf of his principal. He is authorised by it "to commence and carry on, or to defend, at law or in equity, all actions, suits, or other proceedings touching anything in which I or my ships or other personal estate may be in anywise concerned." The power of an attorney to act on behalf of his principal in bankruptcy matters has been undisputed ever since the decision of the Lords Justices in *Ex parte Frampton* (1), twenty-five years ago, in which it was held that, when a person on leaving the country had authorised another, either verbally or in writing, to act for him generally in his absence, the person so authorised could instruct a solicitor to appear on behalf of his principal to shew cause against an adjudication of bankruptcy against him. No doubt we shall be going a step further in holding that the power authorises the signature of a document by the attorney on behalf of the principal; but the signature is essential to the doing of the act—the commencement of proceedings in bankruptcy—which is authorised. I agree with the Registrar.

BOWEN, L.J.—I cannot entertain any doubt that Lord Justice Baggallay is right in the view which he has expressed. The words of the power are wide enough to confer on the attorney authority to commence proceedings in bankruptcy by signing a bankruptcy petition on behalf of his principal.

FRY, L.J.—I am entirely of the same opinion.

(1) 1 De Gex, F. & J. 263; 28 Law J. Rep. Bankr. 21.

Solicitors—J. T. Watson, for debtor; Hollams, Son & Coward, for creditor.

1885. March 16. } HOUGH AND COMPANY *v.* HEAD.

Ship and Shipping—Charter-party—Time Policy — Insurance of Chartered Freight—Extent and Duration of Risk—Liability of Underwriter.

The plaintiffs were owners of a vessel which they chartered, on certain terms as regards payment of freight, for six months from the 21st of March, 1881, with the option to the charterers of extending the time for a period of three or six months. Clause 6 of the charter-party provided that in the event of loss of time by collision, whereby the vessel was rendered incapable of proceeding for more than forty-eight working hours, payment of hire was to cease until such time as she was again in an efficient state to resume her voyage. On the 4th of April, 1881, the plaintiffs insured against loss of freight with the defendant "at and from and for and during the space of six calendar months, from the 15th of April to the 14th of October, 1881," defendant "to pay only loss of hire which may arise in clause 6 of charter-party for accidents occurring between the 15th of April and the 15th of October." On the 27th of June, 1881, the vessel, whilst on a voyage, struck something soft with her bottom, but was able to proceed on her voyage, and it was not until the 18th of November, when the vessel arrived at Liverpool, that it was discovered that she required considerable repairs owing to damage admittedly caused by the accident in June. The charterers, who had exercised their option of continuing the charter until the 21st of December, thereupon gave notice to the plaintiffs discontinuing the hire until the vessel was in a fit state to resume em-

ployment, which she never was until the end of December. The plaintiffs having sought to make the defendant liable under the terms of the policy for loss of hire during the charter in respect of the accident which occurred in June,*—Held, *upon the above facts, that there had been no loss of time by collision such as would justify the refusal of the charterers to pay freight; and that, even if there was, the defendant's liability was confined to loss of chartered freight between the 15th of April and the 14th of October, and could not be extended so as to include loss of hire which only occurred after the expiration of that time.

Special Case stated under the provisions of Order XXXIV. rule 1.

1. The plaintiffs are owners of the steamship *Presnitz*, and on the 12th of March, 1881, by a charter-party of that date, chartered their said vessel to Messrs. Laws, Surtees & Co. for six months, commencing from date when the vessel was put at charterers' disposal, with the option to charterers of continuing the charter for a further period of three or six months, the charter being for the sole use of the vessel to the charterers for the period of the said hire.

2. The freight for the hire of the vessel was to be 12*s.* 6*d.* per gross register ton per month, payable in London, monthly, in advance, in cash, and in proportion for any part of a month.

3. Clause 6 of the charter-party was as follows:—

"That in the event of loss of time by deficiency of men, collision, breakdown of engines, and the vessel becomes incapable of steaming or proceeding for more than forty-eight working hours, payment of hire to cease until such time as she is again in an efficient state to resume her voyage. Should any difference arise between the parties to this contract, either in principle or detail, the same shall be referred for arbitration, at London, to two persons, one to be chosen by each contracting party, with power for them to call in a third, and a decision of a majority shall be final and binding. (The act of God, the Queen's enemies, fire, and all and every other dangers and accidents of machinery, or of the seas, rivers, and navigation, of whatever nature and kind, always mutually excepted.) That in the event of the steamer being lost, the money advanced upon the current month shall be returned in proportion to the number of days which she may not have completed of that month."

4. The vessel was placed at charterers' disposal on, and the six months' charter commenced from, the 21st of March, 1881.

5. The plaintiffs, on the 4th of April, 1881, caused themselves to be insured against loss of chartered freight to the extent or sum of 2,000*l.* by two policies of insurance, one for 800*l.* (which is not in question in this action), and the other for 1,200*l.*, the latter being effected at Lloyd's, and underwritten by the defendant as an underwriter for 150*l.*, portion of such 1,200*l.*

6. It will be seen that the insurance effected was—

"At and from and for and during the space of six calendar months, from the 15th of April to the 14th of October, 1881, both days inclusive."

And for—

"1,200*l.* on chartered freight.

"To pay only loss of hire not exceeding 2,000*l.* which may arise in clause No. 6 of charter-party for accidents occurring between the 15th of April and the 15th of October, but free of claim arising from deficiency of men."

7. During the currency of the six months (from the 15th of April to the 14th of October) covered by the policy—namely, on or about the 27th of June, 1881—and while the vessel was going through the Straits of Magellan on a voyage to the west coast of South America, something happened which is thus described in the "Protest" extended by the master of the vessel on arrival at his Port Talcahnano, on the west coast aforesaid, which was all that was known of the occurrence to those on board the vessel at the time of the happening:—

"The 27th day of June last, when the steamer was proceeding through the Straits of Magellan, on which date, at about quarter past three in the afternoon, weather clear, and going full speed, heading south-south-east along the land, vessel suddenly struck something with her bottom amidships, which however must have been very

soft, for the ship did not lose her headway. The engines were immediately stopped, and soundings having been taken all round, the depth of water was found to range from seven fathoms forward to eleven fathoms aft. Ship having been sounded, and finding that she was making no water, proceeded on voyage."

8. The six months' charter expired on the 21st of September, 1881, the vessel being then on a voyage, and the charterers exercised their option of continuing the charter for a further period of three months, as provided for by the charter-party; the charter under the said charter-party thus being extended to and terminating on the 21st of December, 1881.

9. The vessel arrived at Liverpool on the 18th of November, and, after discharging her cargo there, was put into dry dock for inspection on the 28th of November, when her keel was found to be broken and other damage to her bottom to have been suffered, necessitating considerable repairs. The damage had, although unknown until she was docked as aforesaid, been in fact caused by the said accident in June, 1881.

10. On the 30th of November, 1881, the charterers gave a notice to the plaintiffs, the notice being, so far as material, in the following terms:—

"The steamer having broken her keel and become incapable for steaming for some time, we give you notice that the hire will cease as per charter-party until the vessel is in a fit state to resume employment. We understand the accident took place in the Straits of Magellan during her outward voyage."

11. The repairs were not completed, nor could the vessel be got into an efficient state to go upon a voyage, until the 30th of December, 1881. The charter, as has been stated, terminated on the 21st of December, 1881.

12. The claim under the policy was adjusted by London average adjusters as being 56*l.* 11*s.* 1*d.* per centum of the said 1,200*l.*, the proportion of the defendant in respect of the 150*l.* underwritten by him being 84*l.* 16*s.* 7*d.* This claim, however, is in respect of the whole time occupied by the repairs. The amount will have to be reduced to 61*l.* 13*s.* 10*d.* in the event of it being decided that the defendant is liable for loss of hire up to the 21st of December (inclusive) only.

13. The contention of the plaintiffs is that the defendant is liable under the terms of the policy for loss of hire during the charter, under clause 6 of charter-party, in respect of the accident which occurred in June, although the cessation of payment of the hire did not occur until after the 14th of October.

14. The defendant contends that he is not so liable, because there has been no loss of hire under the charter-party, and that the charterers are liable under the charter-party for freight during the repairs, and that, even if there has been any loss of hire, it did not occur before the 14th of October, 1881, and was not covered by the policy.

The questions for the decision of the Court were—

A. Whether charterers were entitled under clause 6 of the charter-party to refuse to pay the hire from the 30th of November, 1881.

B. If so, whether the defendant was liable under the policy in respect of the loss of hire consequent on such refusal to pay by the charterers.

C. If so, was he liable for the sum of 84*l.* 16*s.* 7*d.*, or only for 61*l.* 13*s.* 10*d.*

If the Court should answer question A and question B in the affirmative, judgment was to be entered for the plaintiffs for such sum as the Court, under question C, should determine, with costs.

If the Court should answer questions A and B, or either of them, in the negative, judgment was to be entered for the defendant, with costs.

Pollard, for the plaintiffs.—The contention on behalf of the defendant will probably be that the charterers were not entitled to refuse to pay for the hire of the vessel; and that, even if they were, the loss of hire did not occur until after the expiration of the six months ending on the 15th of October. But the underwriter here insured on a charter-party, which the charterers had the option of extending, and the intention of the parties was to include loss of hire which resulted from accidents happening between the 15th of April and the 15th of October. Here the accident

unquestionably happened between those two dates, though the cesser of hire did not occur until after October. As regards the question whether the charterers were liable for the freight, it is submitted they were not—first, because what happened here amounted to a "collision" within the terms of the charter-party, the consequence of which has been that the vessel was unable to proceed for more than forty-eight hours; and, secondly, because the occurrence was at all events an accident of the sea within the general words of clause 6, and, as such, "mutually excepted." Whether, therefore, the occurrence be regarded as a collision or an accident of the sea, the plaintiffs are entitled to recover.

He cited 1 *Parke on Insurance*, referring to the unreported case of *Furneaux* v. *Bradley*, and *Rankin* v. *Potter* (1).

Barnes, for the defendant.—First, there was no loss of hire under the charter-party, because what happened did not amount to a collision, and the clause as to accidents of the sea is independent, and would not justify a cesser of hire. Next, even if there was any loss of hire, it did not occur during the period insured by the defendant, and is therefore not covered by the policy. The insurance here was freight at risk during the six months which expired on the 15th of October, and it is not sufficient merely to shew that the accident occurred during the currency of the policy.

He cited *Ripley* v. *Scaife* (2) and *Havelock* v. *Geddes* (3).

Pollard replied.

GROVE, J.—I am of opinion in this case that the plaintiffs are entitled to our judgment. The action is brought against an underwriter upon a policy of insurance on chartered freight, limited as follows:—"At and from and for and during the space of six calendar months from the 15th of April to the 14th of October, 1881, both days inclusive." The fact on which the claim is based occurred on the 27th of June, while the vessel was going through the Straits of Magellan, on a voyage to the west coast of South America, "when the vessel suddenly struck something" (I am quoting the terms of the Protest) "with her bottom amidships, which however must have been very soft, for the ship did not lose her headway." The engines were stopped, and the ship having been sounded, and found not to be making water, proceeded on her voyage. There was, therefore, no stopping of the ship at all, and it was not until she arrived in Liverpool that she was found to be damaged so as to necessitate considerable repairs. This damage, it is found in the Special Case, was in fact attributable to the accident which occurred the previous June. It has been argued by Mr. Pollard on behalf of the plaintiffs that though no damage was done during the particular period covered by the policy—namely, the 15th of April and the 15th of October—yet, as the damage was due to an accident which occurred between those two dates, that the underwriter was liable. He has argued three points—first, that the risk attached because the damage arose in respect of an accident which occurred during the six months when the policy was in force; secondly, that the damage was within clause 6 of the charter-party, which refers to loss of time caused by "collisions," inasmuch as the damage was due to a collision; and lastly, that the damage was at all events due to an accident of the seas, and as such was mutually excepted under the terms of the charter-party, the parties contemplating that for damage so caused there should be no payment of freight so long as the ship was disabled. Now, I am of opinion that the plaintiff is not entitled to recover on any of these grounds. I think that this, being a time policy, was intended only to cover loss of freight occurring between April and October. Mr. Pollard has endeavoured to fix the underwriter with loss of hire, whenever occurring, provided it was the result of an accident which happened between the above-mentioned months; and although a good deal might no doubt be said by way of criticism on the wording of the clause, there seems no reason why an underwriter should undertake such a liability as it is alleged the defendant has undertaken. The underwriter, as it seems to me, only intended to

(1) 42 Law J. Rep. C.P. (H.L.) 169; Law Rep. 6 H.L. 83.
(2) 5 B. & C. 167.
(3) 10 East, 555.

be liable for damage by loss of freight occurring during the period of the policy; but if Mr. Pollard's argument is correct, though there has been no loss of freight during such period here, the defendant is nevertheless liable, inasmuch as subsequently repairs were rendered necessary by reason of damage caused by an accident occurring at a time when the policy was in force, though the damage was undiscovered and unknown until the following November. If that be so, the underwriter has certainly undertaken an unknown liability, for there is no saying how long subsequently to an accident damage sustained by a ship and hitherto undiscovered might be attributed by some people to the accident. Construed in one way the clause is plain and simple; but if it is to be construed as is suggested by Mr. Pollard, its object and extent become a vague and indefinite matter such as I think could not have been within the contemplation of the parties. The true view of this matter seems to me to be laid down in *Arnould on Marine Insurance* (4th edition, at page 350), where it is said: "The two extremes of the time are the termini of the risk; and the adventure begins and ends with the term, wherever the ship may then happen to be, and whether the object of the voyage be then accomplished or not. The risk once begun under a time policy, necessarily ceases when the time limited in the policy comes to an end." I see no reason why this should not apply to a policy on freight. Here the assured limited the policy to a certain time; it was in fact a policy on risk of freight between two dates; and as there was no loss of freight, no liability under the policy, as it seems to me, attached.

I am also in favour of the defendant on the other two grounds, though it is really unnecessary to say much about them. I think that what happened did not amount to a collision; the vessel probably ran on to a bank, and this was not, as it seems to me, a collision within the ordinary acceptation of that term, such as would be the case if a vessel struck another vessel or other navigable matter such as a raft. I also think that under the circumstances the exception clause in the charter-party did not apply. On these grounds the defendants are, in my opinion, entitled to judgment.

MANISTY, J.—I am of the same opinion. The charter was for six calendar months, commencing from the date when the vessel was put at the charterers' disposal—namely, the 21st of March—and therefore, under ordinary circumstances, would come to an end on the 21st of September. An option was, however, given to the charterers to extend the time for a further period of three or six months, and they availed themselves of this option. Let us now turn to the policy of insurance in order to see what is the risk which the defendant undertook. The insurance was a risk on chartered freight for the term of six months from the 15th of April—not from the same date, be it observed, as the commencement of the charter-party. The termini in the policy and the extent of the risk were defined; the risk was "to pay only loss of hire not exceeding 2,000*l.* which may arise in clause No. 6 of the charter-party"—if you stopped there the construction of the clause would be free from doubt, but the clause proceeds: "for accidents occurring between the 15th of April and the 15th of October, but free of claim arising from deficiency of men." Now, if one turns to the 6th clause of the charter-party, it is clear that the liability which the underwriter undertook was loss of hire arising from accidents, and not from deficiency of men, that clause contemplating a possible loss of time by deficiency of men. As regards the exception clause, that is separate and distinct, and if there is contained in a charter-party an express stipulation as to when hire is to cease, you ought not, as it seems to me, to imply that it is to cease in any other event. That, as it seems to me, is a good and a sound principle to act upon. I agree with my brother Grove, that what happened here was not a collision. But it has been argued that the facts bring the case within the words of the exception clause, "accidents . . . of the seas," and as such "mutually excepted." If that be so, any danger of the sea which caused any delay would entitle the charterer to say, "I can escape from payment of freight during that delay." But such a construction would, as it seems to me, be

absolutely inconsistent with that part of the clause which contemplates that the vessel should be incapable of proceeding for more than forty-eight working hours in order that payment of hire should cease. The ordinary canon of construction is that, where a special provision and general words apparently conflict, the presumption is that the special provision was intended to apply to other cases; and here there are other cases to which it may be referred. Moreover, the collision was to be one which rendered the vessel incapable of proceeding; whereas, in this case, she continued voyaging for many months, that is to say, until the 18th of November. The risk, as it seems to me, which attached to the policy only continued from the 15th of April to the 15th of October, during which time there was no loss of freight. Supposing in this case, instead of the time under the charter-party being extended, a new charter had been entered into, Mr. Pollard's argument must go the length of saying that, though the old charter had expired, yet the liability of the underwriter under the policy still continued, because the accident occurred during the time when it was in force. I cannot bring myself to agree to such a proposition; but for reasons which I have already given I think that our judgment ought to be in favour of the defendant.

LOPES, J.—I agree. The action is brought against the defendant as an underwriter, and the clauses which have been referred to shew what the risk really was. The risk which was undertaken by the defendant was, in my judgment, in respect of loss of freight which might occur between the 15th of April and the 15th of October. In order to entitle the plaintiffs to succeed, they are, as I think, bound to shew a loss of freight between these two dates, as well as that the accident occurred during that period. Now here, though the accident occurred between these times, there was no loss of freight; on that ground alone, therefore, I think the plaintiffs cannot be entitled to recover.

Again, putting aside this question of law, it seems to me that nothing which happened here authorised the cesser of payment of freight. The general words in the latter part of clause 6 of the charter-party have been relied upon, but they would be ineffectual for such a purpose unless you can connect them with the earlier clause. But it seems to me that these general words constitute an independent clause of themselves, and cannot be connected with the earlier part of clause 6.

Judgment for defendant.

Solicitors—Lyne & Holman, for plaintiffs; Parker, Garrett & Parker, for defendant.

[IN THE COURT OF APPEAL.]

1885. Jan. 21. } FOX *v.* SMITH. (DAWSON *claimant.*)*

Practice — Interpleader Issue — Judgment or Order at Trial—Appeal—Leave—Judicature Act, 1873, *s.* 19.

An appeal lies, without leave, under section 19 *of the Judicature Act*, 1873, *from the judgment of a Judge upon the interpleader issue with respect to the findings on the facts or a ruling on a point of law; although an appeal will not lie, without leave, from the final determination of the interpleader proceedings under Order LVII. rule* 13.

Ex parte application made on behalf of the execution creditor for leave to appeal against a judgment given for the claimant at the trial of an interpleader issue. The issue was directed to try the question whether certain goods, which had been seized by the Sheriff of Middlesex under a writ of *fi. fa.* in execution of a judgment recovered by Fox against one Mary A. Smith, were at the date of the seizure the property of the claimant as against Fox the execution creditor.

Wills, J., before whom the issue was tried without a jury, gave judgment for the claimant with costs, and refused leave to appeal.

R. T. Wright applied *ex parte* on behalf

* *Coram* Brett, M.R., Cotton, L.J., and Lindley, L.J.

of the execution creditor for leave to appeal, upon the ground that the Judge at the trial had given a decision which was erroneous both as to the facts and the law. —An appeal lies under section 19 of the Judicature Act, 1873, from a judgment given at the trial of an interpleader issue, notwithstanding section 17 of the Common Law Procedure Act, 1860—*Witt* v. *Parker* (1). But rule 11 of Order LVII., which is taken from that section, provides that, except where otherwise provided by statute, the judgment in any action or in any issue ordered to be tried or stated in an interpleader proceeding, and the decision of the Court or a Judge in a summary way under rule 8, is to be final and conclusive against the claimants, and all persons claiming under them, unless special leave to appeal from it is given.

BRETT, M.R.—Before the Rules of the Supreme Court, 1883, were made, it was enacted by the Common Law Procedure Act, 1860, that the determination of an interpleader matter either by the Court or by a Judge at chambers in a summary manner was final, and therefore in such cases there was no appeal. But the trial of an interpleader issue is not a summary proceeding, and the judgment or direction there given, inasmuch as it did not dispose of the whole matter, was not final. The trial of the issue was for the purpose of such a fact or facts being found as would enable the Judge at chambers or the Court to give a final decision. An appeal will therefore lie under section 19 of the Judicature Act, 1873, against the order or direction or judgment upon the issue, in the same manner as against any other order or judgment of a Judge of the High Court. Therefore, before the Rules of Court, 1883, were made, an appeal could be brought against a judgment given upon an interpleader issue. But it was thought necessary to deal with interpleader proceedings, and accordingly the Rules of 1883 were made upon the footing that such proceedings should be regulated by those rules instead of by statute. Rule 11 of Order LVII. was therefore carefully drawn so as to make no alteration in the law. The whole interpleader matter can now be finally determined in a summary manner by the Court or by a Judge at chambers on an interpleader summons, or under rule 13 by the Judge at the trial after the trial of the issue. In such cases the decision is final, and no appeal can be brought against it without leave. But inasmuch as section 19 of the Judicature Act, 1883, gives an appeal from any judgment or order of a Judge of the High Court, it is applicable to an order made or judgment given by a Judge upon the interpleader issue. It having been alleged that this appeal is in respect of an alleged error of the Judge on the trial of the issue, as distinguished from a final decision by him of the interpleader proceeding, there should be no *ex parte* motion for leave to appeal, but the appeal can be brought without any such leave on notice in the usual manner.

COTTON, L.J.— I am of the same opinion.

LINDLEY, L.J.—I am of the same opinion. The law as to interpleader proceedings was based partly on the Common Law Procedure Act, 1860, and partly on so much of the Chancery practice as could be worked with it. That being so, it was thought desirable to embody the Act in the Rules of 1883. Rule 11 of Order LVII. practically amounts to the same as section 17 of the Common Law Procedure Act, 1860. The decision of the Court or a Judge which disposes of the whole interpleader proceeding is, under rule 8, final, and no appeal can be brought against it without leave. But the judgment of the Judge upon the interpleader issue is another matter, and an appeal lies without leave from such judgment under section 19 of the Judicature Act of 1873.

Application refused (2).

Solicitor—M. T. Hodding, for applicant.

(1) 46 Law J. Rep. Q.B. 450.

(2) See also *Robinson* v. *Tucker*, 53 Law J. Rep. Q.B. 317; Law Rep. 14 Q.B. D. 371.

1885. March 20. } CLAXTON *v.* LUCAS AND AIRD.

Employers' Liability Act, 1880 (43 & 44 *Vict. c.* 42), *s.* 6—*Action for Damages exceeding* 5*l.*—*Tort*—*Proceedings in County Court*—*Right to remove to High Court* — *Staying Proceedings* — *Prohibition* — *County Courts Act*, 1856 (19 & 20 *Vict. c.* 108), *s.* 39.

The right of a defendant, under 19 & 20 *Vict. c.* 108. *s.* 39, *to stay proceedings in a County Court in actions of tort, where the damages claimed exceed* 5*l., relates only to such actions as can be brought either in the High Court or the County Court, and has no application to actions brought under the Employers' Liability Act*, 1880.

This was a rule calling upon the plaintiff to shew cause why a writ of prohibition should not issue to stay all further proceedings in an action brought in the City of London Court.

It appeared that the plaintiff had brought an action against the defendants in the above-mentioned Court, under the provisions of the Employers' Liability Act, 1880, to recover damages exceeding 5*l.* The defendants then gave notice to the plaintiff, under section 39 of the County Courts Act, 1856, that they objected to the action being tried in the City of London County Court, and upon their giving security all proceedings were stayed. The plaintiff then commenced an action in the Queen's Bench Division, but after the pleadings were closed was advised that the High Court had no jurisdiction to try it. The plaintiff then made an application to have the stay of proceedings in the City of London Court removed, and this application was granted. A writ of prohibition was then moved for (1).

Horne Payne, for the plaintiff.—The Act of 1880 (43 & 44 Vict. c. 42) creates a new liability, and is not an action of tort within the provisions of section 39 of the County Courts Act, 1856. The latter part of section 6 of the former Act points out the only machinery for removing an action like this into the High Court; and of this machinery the defendant has not availed himself.

[He was stopped.]

McCall, for the defendants.—This is an action of tort, and as such within the provisions of section 39 of the Act of 1856, and there is no provision in the Employers' Liability Act to indicate an intention on the part of the Legislature to take away the privilege conferred upon a defendant enabling him to have such an action tried in the High Court. Moreover, the plaintiff, by accepting and acting upon the defendant's notice, has estopped himself from raising this objection of want of jurisdiction. He cited *Griffiths* v. *The Earl of Dudley* (2).

MATHEW, J.—I think that this rule must be discharged. The case seems to me quite plain. The Employers' Liability Act, 1880, section 6, enacts that every action for recovery of compensation under that Act "shall be brought in a County Court, but may, upon the application of either plaintiff or defendant, be removed

(1) By 19 & 20 Vict. c. 108. s. 39, "If in any action of contract the plaintiff shall claim a sum exceeding twenty pounds, or if in any action of tort the plaintiff shall claim a sum exceeding five pounds, and the defendant shall give notice that he objects to the action being tried in the County Court, and shall give security, to be approved of by the Registrar, for the amount claimed, and the costs of trial in one of the superior Courts of common law, not exceeding in the whole the sum of one hundred and fifty pounds, all proceedings in the County Court in any such action shall be stayed; but if in any such action the defendant do not object to the same being tried by the County Court, or shall fail to give the security aforesaid, the County Court shall dispose of the cause in the usual way; and the entry of the plaint in such action shall be a sufficient commencement of the suit to prevent the operation of any statute of limitation applicable to such claim: provided that nothing herein contained shall prevent the removal of any cause from a County Court by writ of certiorari in the cases and subject to the conditions in and subject to which such cause may now be removed."

By 43 & 44 Vict. c. 42. s. 6, sub-s. 1, "Every action for recovery of compensation under this Act shall be brought in a County Court, but may, upon the application of either plaintiff or defendant, be removed into a superior Court in like manner and upon the same conditions as an action commenced in a County Court may by law be removed."

(2) 51 Law J. Rep. Q.B. 543; Law Rep. 9 Q.B. D. 357.

into a superior Court, in like manner and upon the same conditions as an action commenced in a County Court may by law be removed." This action was not removed according to the mode pointed out by the latter part of the section, and therefore stands in the County Court. Now this is a rule for a prohibition, and the ground on which it is moved is that the Employers' Liability Act must be read in conjunction with the 39th section of the County Courts Act, 1856. But I am clearly of opinion that this section must be considered as controlled by the section in the later Act, and that the term "tort" in the earlier Act must be construed to be such a "tort" as can be tried either in the County Court or in the superior Court. That being so, the 39th section of the Act of 1856 has no application to proceedings of this kind, and the rule for a prohibition must be discharged.

SMITH, J.—I am of the same opinion. Mr. McCall has argued that the 39th section gives the right of the defendant to stay any action of tort over 5*l.*, although it could not be tried in the superior Court. This is rather a strong proposition to argue. At the time when the Act of 1856 was passed, all small torts could be tried either in the County Court or the superior Court, and this section then applied because it was contemplated that the action might be brought in either. The provisions of the 39th section only apply to those actions of tort which can be tried in the High Court; and, as an action under the Employers' Liability Act cannot ordinarily be tried in the superior Court, I am of opinion that this application ought to be refused.

Rule discharged.

Solicitors—Ranger & Burton, for plaintiff; Cope & Co., for defendants.

1885. Feb. 23.

THE LONDON AND LANCASHIRE FIRE INSURANCE COMPANY *v.* THE BRITISH AMERICAN ASSOCIATION.

Practice—"Special Referee"—Consent of Parties—"Official Referee"—"Upon such terms as may be thought proper"—Costs—Judicature Act, 1873 (36 *&* 37 *Vict. c.* 66), *ss.* 56 *and* 57—*Order XXXVI. rule* 7*a.*

The Court or a Judge has no power to refer any cause or matter to a special referee without the consent of the parties thereto.

Where one of the parties to a cause objected to a reference to a special referee, the Judge, in ordering the cause to be tried by an official referee, ordered that "the extra costs occasioned by a trial before an official referee instead of a special referee be reserved":—Held, *that the Judge had jurisdiction to insert these terms in the order.*

This was an action for losses on reinsurances in which the defendants counterclaimed for premiums alleged to be due. The plaintiffs took out a summons to refer the matters in dispute to the arbitration of an actuary; the defendants opposed this, and Field, J., at chambers, referred the action to the official referee, imposing on the defendants the terms that "the extra costs occasioned by a trial before an official referee instead of a special referee be reserved."

The defendants moved to set aside so much of the order as related to the "extra costs."

The plaintiffs moved to set aside the whole order and have the action referred to a special referee.

J. G. Witt, for the defendants.—If the other party does not consent, a Judge has no power to order a reference to a special referee; still less can he drive the party to consent to such a reference by imposing onerous terms as a penalty for not agreeing. By the Judicature Act, 1873, s. 56 (1), the Court or a Judge

(1) 36 & 37 Vict. c. 66, section 56: "Subject to any rules of Court, and to such right as may now exist to have particular cases submitted to

may refer any question arising in a cause to any official or special referee for report to the Court or Judge. By section 57 (1), however, the trial of the issues can only be referred to an official referee, or to a special referee, to be agreed on between the parties.

Order XXXVI. rule 7*a* (2) gives power to the Court or a Judge to refer to an official or special referee, with or without assessors; but it is submitted that special referee there means "special referee to be agreed on between the parties," and that, if not, the rule is *ultra vires*, as it would not relate only to procedure. The expression "on such terms" in section 57 (1) refers to the terms of submission.

Sims Williams, for the plaintiffs.—The power of the Court to refer the cause to a special referee without the consent of the parties is clearly given by the rules, if read apart from sections 56 and 57 of the Judicature Act, 1873.

Under Order XXXVI. rule 7*a*, if the mode of trial is by a Judge without a jury the Court may order a trial by a special referee. Here the mode of trial is by a Judge without a jury, for no jury was ordered under rule 6, and the defendants are not entitled to a jury under rule 2.

Rule 7*a*, although read without the qualifying words in section 57, "to be agreed on between the parties," is not *ultra vires*. The rules in Order XXXVI. regulate matters relating to procedure, and are authorised by the Judicature Act, 1875, section 17. Rule 7*a*, read without the qualifying words, is no more *ultra vires* than rule 50 of the same Order empowering a referee to enter up judgment, which power is not given in sections 56 or 57—*Longman* v. *East* (3) and *Braginton* v. *Yates* (4). Both rules relate to procedure.

As to that part of the order of Field, J., relating to "extra costs," the Judge, under section 57, had power to refer the cause "on such terms as may be thought

the verdict of a jury, any question arising in any cause or matter (other than a criminal proceeding by the Crown) before the High Court of Justice or before the Court of Appeal, may be referred by the Court, or by any Divisional Court or Judge before whom such cause or matter may be pending, for enquiry and report to any official or special referee, and the report of any such referee may be adopted wholly or partially by the Court, and may (if so adopted) be enforced as a judgment by the Court. The High Court or the Court of Appeal may also, in any such cause or matter as aforesaid in which it may think it expedient so to do, call in the aid of one or more assessors specially qualified, and try and hear such cause or matter wholly or partially with the assistance of such assessors. The remuneration, if any, to be paid to such special referees or assessors shall be determined by the Court."

Section 57: "In any cause or matter (other than a criminal proceeding by the Crown) before the said High Court in which all parties interested who are under no disability consent thereto, and also without such consent in any such cause or matter requiring any prolonged examination of documents or accounts, or any scientific or local investigation which cannot, in the opinion of the Court or a Judge, conveniently be made before a jury or conducted by the Court through its ordinary officers, the Court or a Judge may at any time, on such terms as may be thought proper, order any question or issue of fact or any question of account arising therein to be tried either before an official referee, to be appointed as hereinafter provided, or before a special referee to be agreed on between the parties; and any such special referee so agreed on shall have the same powers and duties and proceed in the same manner as an official referee. All such trials before referees shall be conducted in such manner as may be prescribed by rules of Court, and subject thereto in such manner as the Court or Judge ordering the same shall direct."

(2) Order XXXVI. rule 2: "In actions of slander, libel, false imprisonment, malicious prosecution, seduction, or breach of promise of marriage, the plaintiff may in his notice of trial, to be given as hereinafter provided, and the defendant may, upon giving notice within four days from the time of the service of notice of trial, or within such extended time as the Court or a Judge may allow, or in the notice of trial to be given by him as hereinafter provided, signify his desire to have the issues of fact tried by a Judge with a jury, and thereupon the same shall be so tried."

Order XXXVI. rule 7*a*: "In every cause or matter, unless under the provisions of rule 6 of this order a trial with a jury is ordered, or under rule 2 of this order either party has signified a desire to have a trial with a jury, the mode of trial shall be by a Judge without a jury; provided that in any such case the Court or a Judge may at any time order any cause, matter, or issue to be tried by a Judge with a jury, or by a Judge sitting with assessors, or by an official referee or special referee with or without assessors."

(3) 47 Law J. Rep. C.P. 211; Law Rep. 3 C.P. D. 142.

(4) Weekly Notes, 1880, p. 150.

proper." He has exercised his discretion in a discretionary matter, and this Court will not interfere.

J. G. Witt, in reply.—If read without reference to section 57 of the Act the rule is not one as to procedure only. Before the Common Law Procedure Act, 1854, there could not be a trial of issues of fact without a jury. That Act gave jurisdiction to a Judge to try issues without a jury upon the consent of parties, and it also gave a power of compulsory reference, but only to an officer of the Court. The Judicature Act provided for a compulsory reference to an official referee; but, unless by the consent of the parties, there can be no reference to any one but an official of the Court, except for the purpose of making a report, which the Judge may adopt or not as he sees fit. The question before what tribunal a suitor may be compelled to appear is matter of jurisdiction, not of procedure.

GROVE, J.—I have considerable doubt as to whether Order XXXVI. rule 7*a* (2) refers to what is only matter of procedure or not, but am not inclined to differ from my brother Manisty that if the words are to be interpreted strictly as "special referee," without the qualifying words supplied by section 57 of the Judicature Act, 1873 (1), such a reading would not refer to procedure only, and that the rule would, if so read, be *ultra vires*. On the other hand, it was contended that it would be consistent with the Act to read the words as "special referee to be agreed on between the parties." With this I concur, and think that it should be so read rather than inconsistently with the Act. I do not think, however, this order ought to be set aside on the ground urged by the defendants. We cannot discuss the exercise by the Judge of his discretion as to costs. Mr. Justice Field, of course, had power in that discretion to reserve the question of costs, or otherwise deal with them, just as when sitting as a Judge at the trial; and I think it would be most injurious and dangerous for us to interfere with the exercise of his discretion. The order, therefore, must stand.

MANISTY, J.—Mr. Justice Field has made an order referring this case to the official referee, reserving, however, the question of certain costs, and the first application to us is to set aside the whole order and refer the action to a special referee. The first question is whether there is any power to refer to a special referee without the consent of the other side. I do not think Order XXXVI. rule 7*a* should be so read; but that if that was the intention of the makers of the rule, the rule itself is *ultra vires*—it creates a new mode of trial, and, with the meaning sought to be given, it would be a dangerous innovation and an inroad on the right to trial by jury, which has been carefully preserved except in certain cases where it was thought right to take it away. It is clear to me that section 57 of the Judicature Act, 1873, never contemplated a special referee being appointed without the consent of parties.

The Judicature Act went beyond the Common Law Procedure Act in authorising trial by an official referee or special referee agreed on; but neither in the Acts nor in the rules do we see any provision as to the procedure of a trial in the absence of consent before a special referee, or definition of his powers, as in the case of an official referee. I think, therefore, that rule 7*a* must be read in conjunction with section 57, and that the Judge had no power to refer the case to a special referee without the consent of the other side. He has exercised his discretion about the reservation of the costs, with which, I think, we ought not to interfere (5).

Both appeals dismissed. No costs.

Solicitors—Paine, Son & Pollock, for plaintiffs; T. Bowker, agents for Stone, Fletcher & Hull, Liverpool, for defendants.

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(5) Both sides appealed to the Court of Appeal, but the case was compromised.

[IN THE COURT OF APPEAL.]

1885. March 13, 18. } EDMUNDS *v.* WALLINGFORD.*

Contract—Indemnity—Seizure of Goods for Another's Debt—Lawful Seizure—Property in Goods—As against Judgment Creditor—Effect of Barring Claim.

Where an execution has been levied on goods which as between the execution debtor and a third person are the third person's, but as between the execution creditor and the third person are the execution debtor's, the case comes within the principle that a debtor is liable to indemnify a person whose goods have been lawfully seized for his debt, and the third person can recover the sum realised by the goods from the execution debtor.

The sheriff had seized goods for the debt of the defendant, and the claim of the plaintiff to the goods was barred upon interpleader, but the defendant had bound himself by admission as between the parties that the goods were the plaintiff's, and had agreed to pay a sum of money in consideration of the seizure:—Held, *that the plaintiff was entitled to recover that sum from the defendant.*

Griffenhoofe *v.* Daubuz (25 Law J. Rep. Q.B. 237) *explained.*

England *v.* Marsden (35 Law J. Rep. C.P. 259) *not followed.*

Appeal of the defendant from the judgment of Huddleston, B., at the trial without a jury. The statement of facts which follows is taken from the judgment of the Court.

The plaintiff was the trustee in bankruptcy of two sons of the defendant, and the action was brought to recover 1,200*l.*, promised by the defendant to be paid to the plaintiff as such trustee, and in the alternative the plaintiff claimed 1,300*l.*, the sum realised by the sale of goods belonging to the sons, but seized and sold under a judgment recovered against the defendant. The defendant alleged that there was no consideration for his promise to pay the 1,200*l.*, and that the goods seized were his own goods and not those of his sons.

In April, 1876, the defendant bought the business of an ironmonger in Andover in his own name but for his son William. The greater part of the purchase-money was paid by the defendant. The lease of the place where the business was carried on was taken in his name, his wife lived on the place, he came there every week and assisted more or less in the business, and the banking account of the business was kept in his name and he alone drew cheques on that account. In August, 1876, the defendant's sons William and Edward carried on the business as partners under the name of Wallingford Brothers; but the defendant continued to visit the place and to keep the banking account as before, the business cheques being signed by him in the name of the firm. From March, 1878, to September, 1878, the defendant lived at the place. In the autumn of 1878, an action was brought against the defendant by the Mutual Society, and in October, 1878, judgment was signed against him. On the 24th of October, 1878, the goods on the premises where the business was carried on were seized. The sons claimed them, but upon an interpleader summons taken out by the sheriff the claim was on the 11th of November, 1878, barred, and the goods seized were accordingly sold. They realised 1,300*l.*, and this sum has been paid into Court in the action of *The Mutual Society* v. *Wallingford* as a security for what may be found due from the defendant to the society upon taking certain accounts directed to be taken in that action. On the 28th of November, 1878, the sons were adjudicated bankrupts. The plaintiff is their trustee, and on the 8th of May, 1879, the defendant entered into the agreement sued upon in the present action:—

"I, John Wallingford, hereby agree with Henry William Edmunds, as trustee in the bankruptcy of my sons William John and Edward, that in consideration of their ironmongery stock in and about their shop and premises, at High Street, Andover, having been seized and sold on behalf of the Mutual Society of Ludgate Hill, London, in payment of an alleged claim against me, I undertake and agree, that in the event of my succeeding in an action I am about to bring against the said

Coram Lord Coleridge, C.J., Sir James Hannen, and Lindley, L.J.

Mutual Society, to pay all the trade creditors of my sons for debts contracted while in business at High Street, Andover, in full, through the trustee Henry William Edmunds; and further I agree, that whether my said action against the Mutual Society is successful or not, I will pay three hundred pounds per annum to the said trustee until I shall have paid him a sufficient sum to pay the trade creditors of my aforesaid sons in full.

"John Wallingford.

"Dated this 8th day of May, 1879."

The trade debts of the defendant's sons amounted to 1,200*l.*

Finlay, Q.C., and *W. B. Allen*, for the defendant.—The plaintiff's claim to the goods was barred by the Judge at Chambers, and that decision is, by section 17 of the Common Law Procedure Act, 1860, "final and conclusive." As to the alternative claim on the agreement it was made without consideration. The principle is that a past consideration will not support a promise not implied by law—*Roscorla* v. *Thomas* (1). There must be at the time of the consideration either a request or privity. They cited on this point *Lampleigh* v. *Brathwait* (2), *Jeffries* v. *Gurr* (3), *Pownal* v. *Ferrand* (4), *Exall* v. *Partridge* (5), *Grissell* v. *Robinson* (6), *Bradshaw* v. *Beard* (7), and *England* v. *Marsden* (8). This last is the latest case on the subject, in which it was held by Erle, C.J., and Byles, Keating, and Montague Smith, JJ., that a bill of sale holder paying rent to redeem his goods from a distress could not recover the rent from the tenant.

Jelf, Q.C., and *J. Watson*, for the plaintiff.—As to the claim of the bankrupts being barred by the Judge's order, the defendant was not barred by that order, and therefore the bankrupts and the plaintiff are not barred. Estoppel by record to be binding must be mutual. As to section 17 of the Common Law Procedure Act, 1860, it was intended for the relief of the sheriff. As to *England* v. *Marsden*, in the note to *Osborne* v. *Rogers* (9), Sir Edward Vaughan Williams says: "The correctness of this decision (*England* v. *Marsden*) seems to be doubtful, for the plaintiff in order to get his goods was compelled to pay the rent due from the defendant, and by so doing benefited him."

[LINDLEY, L.J.—The case was doubted by Thesiger, L.J., in *In re Fox; ex parte Bishop* (10).]

They also cited *Rodgers* v. *Maw* (11).

Finlay, Q.C., in reply, cited *Pawle* v. *Gunn* (12), *per* Tindal, C.J., and *Griffenhoofe* v. *Daubuz* (13). In *Rodgers* v. *Maw* (11) both elements of privity and request were present.

Cur. adv. vult.

The judgment of the Court was (on March 18) delivered by

LINDLEY, L.J., who, after stating the facts in the words in which they are stated above, proceeded: Such being the facts, it is necessary to consider the legal questions to which they give rise. The first question is the liability incurred by the defendant to his sons by reason of the seizure of what he has deliberately asserted to be their goods for his debt. That, as between the father and the sons, the goods were theirs, we consider established by the father's own statements. Speaking generally, and excluding exceptional cases, where a person's goods are lawfully seized for another's debt, the owner of the goods is entitled to redeem them, and to be reimbursed by the debtor against the money paid to redeem them, and in the event of the goods being sold to satisfy the debt, the owner is entitled to recover the value of them from the debtor. The authorities supporting this general proposition will be found collected in the notes to *Lampleigh*

(1) 3 Q.B. Rep. 234; 11 Law J. Rep. Q.B. 214.
(2) Hob. 105; 1 Sm. L.C. (7th ed.) 141.
(3) 2 B. & Ad. 833; 1 Law J. Rep. K.B. 23.
(4) 6 B. & C. 439.
(5) 8 Term Rep. 308.
(6) 3 Bing. N.C. 10; 5 Law J. Rep. C.P. 313.
(7) 12 Com. B. Rep. N.S. 344; 31 Law J. Rep. C.P. 273.
(8) 35 Law J. Rep. C.P. 259; Law Rep. 1 C.P. 52.
(9) 1 Wms. Saund. (7th ed.) 361.
(10) 50 Law J. Rep. Chanc. 18, at p. 23; Law Rep. 15 Ch. D. 400, at p. 417.
(11) 15 Mee. & W. 444; 16 Law. J. Rep. Exch. 137.
(12) 4 Bing. N.C. 445; 7 Law J. Rep. C.P. 206.
(13) 5 E. & B. 746; 25 Law J. Rep. Q.B. 237.

v. *Brathwait* (2) and *Dering* v. *Winchelsea* (14). As instances illustrating its application, reference may be made to the case of a person whose goods are lawfully distrained for rent due from some one else, as in *Exall* v. *Partridge* (5); to the case of a surety paying the debt of his principal; to the case where the whole of a joint debt is paid by one only of the joint debtors; to the case where the joint property of a firm is seized for the separate debt of one of the partners.

The right to indemnity or contribution in these cases exists, although there may be no agreement to indemnify or contribute, and although there may be in that sense no privity between the plaintiff and defendant—see *Johnson* v. *The Royal Mail Steam Packet Company* (15)—but it is obvious that the right may be excluded by contract as well as by other circumstances. When the owner of the goods seized is as between himself and the person for whose debt they are seized liable to pay the debt, it is plain that the general rule is inapplicable; and this explains the case of *Griffenhoofe* v. *Daubuz* (13). There the plaintiff, who was the tenant of the defendant, sued him to recover the value of a stack of wheat distrained for tithe rent-charge. The declaration alleged that the defendant was liable to pay, and ought to have paid, this rent-charge. The defendant, on the other hand, denied this alleged liability, and upon this part of the case the verdict was entered for the defendant, and the defendant succeeded in the action. The plaintiff, without attempting to disturb the verdict, applied for judgment *non obstante veredicto*, for alleged error on the record, on the ground that, although the defendant was not personally liable to pay the rent-charge, yet that his farm and land were liable to pay it, and therefore he ought to indemnify the plaintiff. But it was held that many circumstances might exist rendering the plaintiff the person liable to pay the tithe rent-charge, and that, having regard to the verdict, the record did not shew that the defendant was liable to indemnify the plaintiff against it. The Court said, "There is no allegation of any privity entitling the plaintiff to recover in any form of action." We are not sure that we quite appreciate the meaning of the word "privity" in this passage; but the truth seems to have been that the merits as disclosed at the trial were against the plaintiff, and that the Court was not disposed to be astute and to give him judgment after his failure at the trial.

Another exception to the general rule has been held to exist where the owner of the goods has left them for his own convenience where they could be lawfully seized for the debt of the person from whom he seeks indemnity—*England* v. *Marsden* (8). The plaintiff in that case seized the defendant's goods under a bill of sale, but did not remove them from the defendant's house. The plaintiff left them there for his own convenience, and they were afterwards distrained by the defendant's landlord. The plaintiff paid the rent distrained for, and brought an action to recover the money from the defendant. The Court, however, held that the action would not lie, as the plaintiff might have removed his goods before, and could not under the circumstances be considered as having been compelled to pay the rent. This appears to us a very questionable decision. The evidence did not shew that the plaintiff's goods were left in the defendant's house against his consent; and although it is true that the plaintiff only had himself to blame for exposing his goods to seizure, we fail to see how he thereby prejudiced the defendant, or why, having paid the defendant's debt in order to redeem his own goods from lawful seizure, the plaintiff was not entitled to be reimbursed by the defendant. This decision has been questioned before by Lord Justice Thesiger (10), and by the late Mr. Justice Vaughan Williams in the notes to the last edition of *Wms. Saund.* (9), and we think the decision ought not to be followed. Be the case of *England* v. *Marsden* (8), however, right or wrong, it is distinguishable in its facts from the case now before us.

In order to bring the present case within the general principle alluded to above, it is necessary that the goods seized

(14) 1 Wh. & Tud. L.C. (2nd ed.) 78.

(15) 37 Law J. Rep. C.P. 33; Law Rep. 3 C.P. 38.

shall have been lawfully seized, and it was contended before us that the sons' goods were in this case wrongfully seized, and that the defendant, therefore, was not bound to indemnify them. But when it is said that the goods must be lawfully seized, all that is meant is that as between the owner of the goods and the person seizing them the latter shall have been entitled to take them. It is plain that the principle has no application except when the owner of the goods is in a position to say to the debtor that the seizure ought not to have taken place; it is because as between them the wrong goods have been seized that any question arises. Now, in this case it has been decided between the owners of the goods seized (that is, the sons) and the sheriff seizing them that the goods were rightfully seized; and although the defendant is not estopped by this decision, and is at liberty, if he can, to shew that the seizure was one which the sheriff was not justified in making, he has not done so. Indeed, the defendant's connection with his son's business was such as to justify the inference that the sheriff had a right to seize the goods for the defendant's debt; and if in truth any mistake was made by the sheriff, the defendant had only himself to thank for it. His own conduct led to the seizure, and, although he did not in fact request it to be made, he brought the seizure about, and has wholly failed to shew that the seizure was wrongful on the part of the sheriff.

The case therefore stands thus: Goods which the defendant has admitted in writing to be his sons' have, owing to his conduct, been legally taken in execution for his debt, and the proceeds of sale have been impounded as a security for what is due from him to his execution creditors. The defendant therefore was liable to repay to his sons the amount realised by the sale of the goods. This liability the plaintiff as the sons' trustee in bankruptcy was in a position to enforce, and he has never released it or agreed so to do except upon payment of 1,200*l.* The plaintiff is in a position now to enforce that liability if the defendant succeeds in shewing that his express promise to pay 1,200*l.* is not legally binding upon him. The plaintiff is content to take the 1,200*l.* expressly promised to be paid instead of insisting on his right to the 1,300*l.*; and Baron Huddleston has properly given the plaintiff judgment accordingly.

Appeal dismissed, with costs.

Solicitors—Robinson & Dees, agents for C. H. Edwards & Gough, Birmingham, for plaintiff; Purkis & Co., for defendant.

1885. March 11. } WEGUELIN (*appellant*) *v.* WYATT (*respondent*).

Revenue—Inhabited House Duty—Exemption—Caretaker—Servant or other person—41 *Vict. c.* 15. *s.* 13, *sub-s.* 2—44 *Vict. c.* 12. *s.* 24.

The appellant was possessed of premises which were used for business purposes only. A woman resided on the premises as caretaker, and it was a condition of her employment that her son, who was a clerk employed elsewhere, should sleep on the premises for increased safety:—Held, *that the premises were not exempt from inhabited house duty under* 41 *Vict. c.* 15. *s.* 13, *sub-s.* 2, *and* 44 *Vict. c.* 12. *s.* 24.

Case stated by the Commissioners of Income Tax for the City of London, by way of appeal against an assessment to the inhabited house duties made by the surveyor of taxes, as assessor of inhabited house duties under the Act 43 & 44 Vict. c. 19. s. 43, for the year ending the 5th of April, 1884, upon premises 7 Austin Friars and 57½ Old Broad Street in the City of London.

The premises, which consist of one house containing three floors and the attics, are let to and occupied by merchants and traders, and are used for business purposes only. No persons sleep on the premises at night other than the following—namely, Sarah Phillips, widow, who has been for many years and is now the caretaker of the premises; her son W. G. Phillips, aged 22, who is a clerk in the employ of a firm of merchants carrying on business elsewhere; a daughter, aged 19, and a servant. The

caretaker being a woman, it is a condition of her employment that the son shall sleep on the premises for increased safety.

The caretaker with the above persons occupy five attic rooms, and no rent is received by the appellant in respect of such occupation.

The surveyor of taxes contended that the son, W. G. Phillips, being a clerk, his residence deprived the appellant of his claim to exemption—W. G. Phillips not being a servant or other person within the terms of the exemption in 41 Vict. c. 15. s. 13, sub-s. 2, as defined by 44 Vict. c. 12. s. 24; and that the premises were liable to be assessed to the duties on inhabited houses.

The appellant contended to the contrary, and that W. G. Phillips having been and being now a member of the caretaker's family his employment as a clerk did not render the premises liable to the duties.

The commissioners were of opinion that the appellant was chargeable with the duties, and confirmed the assessment.

The question for the opinion of the Court was whether under the circumstances the premises constituted an inhabited house within the meaning of the Act, so as to be held liable to the payment of the inhabited house duty.

C. A. H. Black, for the appellant.—The premises are exempt from inhabited house duty by 41 Vict. c. 15. s. 13, sub-s. 2 (1). The son is a person employed by the appellant to take care of the premises, and he and his mother together are the caretakers, and within the interpretation of the words "other person" in 44 Vict. c. 12 (2). The appellant is entitled to a sufficient number of caretakers for the protection of the premises. The son does not sleep on the premises for the convenience of his mother, but for the convenience of the appellant. *Yewens* v. *Noakes* (3) and *Rolfe* v. *Hyde* (4) were referred to.

Sir H. James (*Attorney-General*) and *A. V. Dicey*, for the respondents, were not called upon.

MATHEW, J.—I am of opinion that the commissioners have come to a right determination, and that these premises are subject to inhabited house duty. So far as the mother is concerned, her living in the house would not render it liable to duty. It is stated in the case that "the caretaker being a woman, it is a condition of her employment that the son shall sleep on the premises for increased safety"—and I gather from this that the mother stipulated that her son should live in the house while she was caretaker. This is not a condition of things contemplated by the statute, and I do not see how by any ingenuity it can be tortured so as to come within the provisions of either of the sections referred to.

SMITH, J.—I am of the same opinion, and I wish to put the other alternative, which is, assuming the son did not go there at the request of the mother, but at the request of the owner of the house, then the owner of the house has two caretakers; he has the mother and son. The statute only says that he is to have one.

Judgment for the respondent.

Solicitors—Wordsworth, Blake & Co., for appellant; The Solicitor of Inland Revenue, for respondent.

(1) 41 Vict. c. 15. s. 13, sub-s. 2 (the Customs and Inland Revenue Act, 1878): "Every house or tenement which is occupied solely for the purpose of any trade or business or of any profession or calling, by which the occupier seeks a livelihood or profit, shall be exempted from the duties by the said commissioners upon proof of the facts to their satisfaction, and this exemption shall take effect although a servant or other person may dwell in such house or tenement for the protection thereof."

(2) 44 Vict. c. 12. s. 24: "With reference to the exemption from the duties on inhabited houses given by sub-section 2 of section 13 of the Customs and Inland Revenue Act, 1878, the term 'servant' shall be deemed to mean and include only a menial or domestic servant employed by the occupier, and the expression 'other person' shall be deemed to mean any person of a similar grade or description not otherwise employed by the occupier, who shall be engaged by him to dwell in the house or tenement solely for the protection thereof."

(3) 50 Law J. Rep. Exch. 132; Law Rep. 6 Q.B. D. 530.

(4) 50 Law J. Rep. Q.B. 481; Law Rep. 6 Q.B. D. 670.

1885. March 27. } HIRST v. TAYLOR AND ANOTHER.

Negligence—Diversion of Highway—Fencing diverted Road—Duty arising from Exercise of Statutory Right to divert Highway—Evidence of Negligence—Nonsuit.

Where contractors, in the exercise of power given by the Act of Parliament authorising the construction of a railway, diverted a public footpath, substituting a new track at a certain point, but not fencing it from the old, and the plaintiff, who had passed along the diverted track in the morning, failed, while returning in the dark, to diverge at the proper point and the proper angle, and consequently was injured by falling over an unfinished bridge some distance from the place where she wrongly diverged,—Held, *that there was evidence of negligence in the defendants which ought to have been left to the jury, on the ground that a person who had statutory powers to divert a highway was bound to make the new road so that the public might use it with reasonable safety in the dark.*

In this case an action had been brought by the plaintiff, a mill-hand, to recover damages for personal injury alleged to have been sustained by her in consequence of the negligence of the defendants, who were contractors for the construction of a new line belonging to the London and North-Western Railway Company between Uppermill and Denton. The action came on for trial at the Manchester Summer Assizes before Day, J., and a common jury, when, at the close of the plaintiff's case, the learned Judge ruled that there was no evidence of liability on the part of the defendants, and nonsuited the plaintiff.

C. A. Russell now moved to set aside the nonsuit and enter judgment for the plaintiff for 70*l.*, the amount of damages agreed upon in the event of its being held that the learned Judge was wrong in withholding the case from the jury.

The facts were, that the railway company had obtained powers, by their Act authorising the construction of the line, for diverting an ancient footpath, across the site of which the line ran. The diversion occurred close to the new line, and consisted in the path being diverted to the right and continuing for some distance parallel to the course of the new line, and then turning to the left underneath it at a place where a bridge was planned to carry the line across the path. The path was not at the point of diversion, nor, while running parallel with the railway, fenced from the railway; and the railway was being formed by an embankment, very low opposite the point of diversion, but becoming higher toward the proposed bridge. The plaintiff had come in the course of the day of the 19th of January from the other side by the new path, crossing where the proposed bridge was to be, and then coming up by the new piece of path and so getting into the old path. Returning, however, at night, about 9 p.m., when it was dark, she failed to turn rightly at the point of diversion, but keeping too much up, walked along the embankment, and fell over the unfinished buttress of the bridge and was much injured. There was nothing dangerous in the path itself either in the old or new parts, nor was the part of the embankment on which the plaintiff walked sensibly different in respect of the material underfoot from the new track which she ought to have followed.

C. A. Russell, for the plaintiff.—There was evidence here of negligence in the defendants, because, having obtained a power of interfering with a public footpath, it became their duty in exercising such power to provide for the safety of the public. Here there was nothing to indicate the point of diversion, at any rate in the dark, and there was no fence to keep a person from going on to the dangerous part of the line. Surely this was evidence of negligence which the jury ought to have been allowed to consider. Then there was not, on the undisputed facts, any contributory negligence in the plaintiff which necessarily disentitled her from recovering. If her knowledge of the change of the path derived from her passing earlier in the day is to militate against her, at most it was a fact for the jury to consider.

J. M. Moorsom and *W. Wills*, for the defendants.—The nonsuit was right. There was no danger in the path itself as diverted, and none anywhere near to it.

Hirst v. *Taylor.*

There was therefore no duty on the defendants to fence off the new path. Their act in making the diversion was a duly authorised one. Then the plaintiff had notice of the diversion, and she was clearly guilty of such contributory negligence as was fatal to her maintaining the action. She must have walked a considerable distance along the new line embankment, and must have known that she was off the track. He cited *Barnes* v. *Ward* (1), *Hardcastle* v. *The South Yorkshire Railway Company* (2), *Wilkinson* v. *Fairrie* (3), and *Davey* v. *The London and South-Western Railway Company* (4).

C. A. Russell, in reply.

MANISTY, J.—This is a somewhat complicated case, and upon the best consideration I can give to it, having heard able arguments on both sides, I come to the conclusion that there was evidence for the jury and that the nonsuit was wrong.

The question at the root of the matter is this: When persons have by statute a right given to them to divert a public footpath, is there a duty on them to so construct the diversion that the public using the diverted path may use it with reasonable safety?

The accident here happened at night, and the plaintiff had in the course of the day travelled along the new path, and therefore she knew that the old path had been closed and a new one substituted. No doubt that was an important circumstance; but it must be considered how far, in the opinion of a jury, it might be negligence on her part not to follow the new path in the evening. It seems that the old path was pitched and well-defined, and the new one only a track, and at night probably nothing was visible. She knew, indeed, that at some point she had to turn off, and in the dark she may well, without any negligence on her part, have turned off, thinking she was going in the track, while unfortunately, though very close to it, she did not keep to it; in her evidence she said it was smooth walking where she did go. I think, as a matter of law, that a person who gets the right to divert an old path must make the new one reasonably easy to be followed and safe. That is a question of fact for a jury, and there was some evidence of it, and the nonsuit was, I think, wrong and must be set aside.

LOPES, J.—This case, being an action for negligence in which Mr. Justice Day nonsuited the plaintiff, raised a somewhat novel point, on which it is said there is no authority. It seems to me that it is capable of being decided on the general principles of law applicable to negligence. The question is, was there evidence on which the jury could reasonably find negligence in the defendants. The facts were, that the defendants, contractors for a new railway, had, under statutory powers, diverted a highway, and had turned it at a sharp angle. The plaintiff, as one of the public, had used the highway that morning, and at night was returning when it was quite dark, and, missing the proper turn, fell over the buttress of the unfinished bridge and was injured. The law is this: If the point of diversion is at a place where a reasonably careful person might go astray in the dark, there is a duty on the person diverting the road to protect the public against such possibility of error. Applying that law to the case before us, I should have left to the jury two questions. First, was this a place where a reasonably careful person might go astray on a dark night? Secondly, did the defendants use reasonable care and precaution in protecting the public at this point? I think that there was evidence on both questions on which the jury's opinion ought to be taken, and therefore that the nonsuit was wrong and must be set aside.

Order for entry of judgment for the plaintiff for 70l., pursuant to agreement.

Solicitors—Bolton, Robbins, Busk & Co., agents for Joseph Bradbury, Ashton-under-Lyne, for plaintiff; Bolton & Co., agents for Buckley & Miller, Staleybridge, for defendants.

(1) 9 Com. B. Rep. 392.
(2) 4 Hurl. & N. 97.
(3) 32 Law J. Rep. Exch. 173.
(4) 53 Law J. Rep. Q.B. 58; Law Rep. 11 Q.B. D. 213.

1885. March 2. } CARSON v. PICKERSGILL AND SON.

Practice—Taxation of Costs—Person suing in forma pauperis—Order XVI. rules 22–31.

On the taxation of the costs of a successful plaintiff suing in forma pauperis, only actual disbursements should be allowed from the date of the order authorising him to sue in forma pauperis. Fees of counsel or solicitor for business done after that date cannot be allowed on taxation, as these services must be rendered gratuitously by Order XVI. rule 27.

Appeal from a decision of Chitty, J., refusing an order to review taxation of plaintiff's costs.

This was an action in which the plaintiff sued *in forma pauperis*. The trial took place at the Durham Assizes, before Mathew, J., and a jury, when a verdict was found for the plaintiff for 50*l.*, and judgment entered for that amount. No special order being made as to the principle on which the costs should be taxed, the plaintiff's solicitor delivered his bill of costs on the footing of the plaintiff being an ordinary litigant, including, therefore, solicitor's and counsel's fees at the trial.

On taxation Master Gordon allowed the plaintiff his full costs up to the 18th of June, 1884, the date of the order permitting the plaintiff to sue *in forma pauperis*; but allowed after that date only costs on the pauper scale, that is, actual costs out of pocket. He disallowed counsel's and solicitor's fees at the trial. The Master also disallowed the costs of the plaintiff's witnesses, on the ground that such costs had not been paid by the plaintiff, and that, on the authority of *Freeman* v. *Rosher* (1), they could only be allowed on production of the vouchers for their payment.

J. Lawson Walton, for the plaintiff.—The present practice is regulated by Order XVI. rules 22–31, and the question is, what is the meaning of the words in rule 31 "as in other cases." It is submitted that they mean, "as in the case of ordinary litigants." To construe these rules it is therefore necessary to see what was the older practice. 11 Hen. 7. c. 12 was the first enactment on this subject, and is the origin of Order XVI. rules 26 and 27. 23 Hen. 8. c. 15. s. 2 enacted that persons suing *in forma pauperis* should not have to pay any costs, but should suffer other punishment in the discretion of the Judge before whom the case was tried. The practice under these statutes was introduced into the Chancery Courts in the time of Lord Clarendon, having been copied from an order made by Oliver Cromwell's commissioners (see *Beame's Eq. Costs*, s. 10, "Paupers"), and was subsequently embodied in Chancery Consolidated Orders, Order VII. rules 8–11, which corresponds with Order XVI. rules 26 and 27. In *Rice* v. *Brown* (2), decided in 1797, it is stated that Lord Somers, in the case of *Scatchmer* v. *Foulkard*, ordered costs to a pauper, "for though he were at no cost, or at a small cost, yet the counsel and clerks did not give their labour to the defendant but to the pauper." In *Rattray* v. *George* (3) Lord Eldon held that the matter was one in the discretion of the Court. This decision was followed in Chancery Consolidated Orders, Order XL. rule 5, which enacted that where costs were ordered to be paid to a party suing or defending *in forma pauperis*, such costs should, unless the Court otherwise directed, be taxed as "Dives'" costs. This remained the practice, on the Chancery side, down to the date of the Rules of 1883. On the common law side, however, owing to the prevalence of suits *in forma pauperis*, rule 121 of the Reg. Gen. H.T. 1853, was framed with a view of checking them. In *Dooley* v. *The Great Northern Railway Company* (4) it was held, on the construction of the rule, that a person suing *in forma pauperis* could not recover anything on taxation of costs on account of his counsel's or attorney's fees. From this date the common law and Chancery practice were at variance. That rule of 1853, being a rule as to costs, is repealed by the Judicature Acts—see *Garnett* v. *Bradley* (5).

(1) 6 Dowl. & L. 517; 18 Law J. Rep. Q.B. 105.

(2) 1 Bos. & P. 39.
(3) 16 Ves. 232.
(4) 4 E. & B. 341; 29 Law J. Rep. Q.B. 83.
(5) 48 Law J. Rep. Exch. 186; Law Rep. 2 Ex. D. 349; ibid. 3 App. Cas. 944.

The statutes of Henry 7 and Henry 8 were repealed by 46 & 47 Vict. c. 49; therefore, at the date of the framing of the Rules of 1883, the Chancery practice alone remained, and Order XVI. rules 22–31 must have been intended to incorporate it. It is important to notice the phrase in rule 27, "whilst a person sues or defends as a pauper." Under the old practice it was held that a plaintiff suing *in forma pauperis* was dispaupered if he recovered 5*l.* The plaintiff is therefore entitled to have his costs taxed like those of an ordinary litigant. In any case the costs of the plaintiff's witnesses should be allowed.

H. B. Manisty, for the defendants.—There is nothing to shew that Order XVI. rules 22–31 were intended to perpetuate the Chancery as opposed to the common law practice in this matter. Under the latter part of Order XVI. rule 24 there is no legal liability on the part of a pauper to pay his counsel's or solicitor's fees. Under rule 27 any one accepting a fee from a person suing *in forma pauperis*, for the conduct of business in Court, is guilty of a contempt of Court. How then can such fees be charged against the defendants? Rule 121 of the Reg. Gen. H.T. 1853 is really incorporated in these rules. Order XVI. rules 22–31 must be read in their natural sense, and there is nothing in them to justify the construction the plaintiff puts upon them. As regards the witnesses the Master would not allow them—see *Freeman* v. *Rosher* (1).

GROVE, J.—Mr. Walton has shewn industry and order in his able argument on the history of the law on this subject, which does not, however, as he has contended it should, alter the construction to be placed on the Rules of the Supreme Court, 1883, Order XVI. rules 24–27 and rule 31. These rules are in fact not far from a return to the old law under the statute of Henry 7. It is by that statute enacted, *inter alia*, "that every poor person or persons within the realm shall have, by the discretion of the Chancellor of this realm for the time being, writ or writs original, or writs of subpœna, according to the nature of their causes, therefor nothing paying to your highness for the seals of the same, nor to any person for the making of the same writ and writs to be hereafter sued. And that the said Chancellor for the same time being shall assign such of the clerks which shall do and use the making and writing of the same writs to write the same ready to be sealed, and also learned counsel and attorneys for the same, without reward taken therefor," and it proceeds further to enact that counsel and attorneys should be assigned by the Court at the trial without any reward for their counsel, help, or business. That statute was modified by 23 Hen. 8. c. 15. s. 2, which enacted that persons suing *in forma pauperis* should not be compelled to pay any costs, but should suffer other punishment as the Court before whom the case depended should think reasonable. The almost inevitable consequence of the statute of Henry 7 was that speculative actions should be brought by paupers. The Act of Henry 8 was passed to check this practice and punish the pauper if he lost. In *Blackstone*, book iii. ch. 24. p. 399, a practice is stated to have existed of giving an unsuccessful pauper plaintiff the option of paying the costs or being whipped; but so far as the whipping is concerned this practice was never apparently enforced. For a time the same practice seems to have prevailed on the common law and Chancery side, under which a plaintiff suing *in forma pauperis*, if successful, recovered all his costs and afterwards such costs as the Judge should order—*Rattray* v. *George* (3)—or, in the absence of order, all his costs—see Consolidated Orders, Order XL. rule 5. This rule seems to have been acted upon by the Chancery Judges for a considerable time, though the practice was altered on the common law side by rule 121 of the Reg. Gen. H.T. 1853. Now the argument of Mr. Walton, as I understand it, is that Order XVI. rules 24, &c., are to be read with the construction put upon the Consolidated Orders by the Court of Chancery. Now I agree that where the same language is used in successive statutes with regard to the same subject-matter, it should receive the same construction. But where it differs, we must look at the object and intention of the statute and consider the exact language used. It is unnecessary to

follow out the modifications in the practice from the time when *Rice* v. *Brown* (2) decided that a pauper had the same rights in regard to costs as a solvent person, for the present rules must be construed in their plain grammatical sense, except so far as any technical terms in them have been the subject of judicial interpretation. I cannot doubt these rules were intended to prevent a pauper recovering moneys which he is not under any liability to pay. That the other party should be saddled with them would be a most undesirable thing, and calculated to encourage speculative actions by paupers. Now Order XVI. rule 24 says that no person shall be permitted to sue as a pauper unless the case laid before counsel for his opinion, and his opinion thereon, with an affidavit of the party or his solicitor that the case contains a full and true statement of all the material facts to the best of his knowledge and belief, shall be produced before the Court or Judge or proper officer to whom the application is made, and no fee shall be payable by a pauper to his counsel or solicitor. It varies slightly from the old rule and is rather more rigid, the object being to prevent collusion by laying a fair *prima facie* case before counsel. It declares in terms that no fee shall be payable by a pauper to his counsel or solicitor. Rule 25 relieves him from the payment of Court fees. Rule 26 is not unlike the old statute of Henry 7, and rule 27 declares that no person shall take, or agree to take, or seek to obtain from a person suing *in forma pauperis* any fee, profit, or reward for the conduct of his business in Court, and that any person who does so shall be guilty of a contempt of Court. Mr. Walton argues that when the case is over counsel can then take a fee and the other side be charged with it, although he cannot agree to take it beforehand. This seems to me scarcely a rational construction of the rules. The result would be that, although in the first instance the pauper could not mark the fee on counsel's brief, in the event of his succeeding he would do so, and the counsel would come within the terms of rule 27 in taking a reward for the conduct of the business in Court. Test it by the practice of the Masters on taxation. A voucher is required before counsel's fees are allowed. The losing party would not pay counsel's fees before taxation, the pauper cannot—how then can a voucher be produced to the Master? Surely, in the result, this would amount to an agreement by counsel to accept a fee, and we should thus give him the means of enforcing a fee to which he is not entitled at law. Now it is suggested by Mr. Walton that the words "to be taxed as in other cases" in Order XVI. rule 31, mean that the costs are to be taxed on the same principles as the costs in other cases. This is not so. The words apply to the mode of taxation and not to the extent of the liability, which it is not intended to alter. I am of opinion that the order of Mr. Justice Chitty was right. As regards the witnesses, an arrangement can be made that the Master should allow them, on the understanding that they are subsequently paid by the plaintiff, and the vouchers produced. They certainly ought to be allowed.

MANISTY, J.—I am of the same opinion, and I have little to add. The meaning of the rules must be gathered from their language, and we cannot go behind them, except so far as the older practice may throw light upon them. The tendency of the Rules of 1883 is rather to increase the precautions against speculative pauper actions. For a long time it has been the practice that certain things should be done for a pauper gratuitously, and it would be a very serious thing for a defendant if in the event of a pauper plaintiff succeeding he has to pay for such gratuitous services, while in the event of himself succeeding he would get no costs from the pauper. The words of the rules as to counsel's and solicitor's fees are very clear and unambiguous.

Appeal dismissed. Costs of appeal to be deducted from amount payable to the plaintiff by the defendants.

Solicitors—J. E. & H. Scott, agents for Graham & Shepherd, Sunderland, for the plaintiff; Hickin & Graham, agents for Simey, Sunderland, for the defendants.

1885. March 26. } HAWKE *v.* BREAR.

Practice — Costs—Reference of Action and all Matters in Difference—Costs to abide Event—"Event" construed distributively.

When on a reference of a cause and all matters in difference the submission provides that the costs of the cause and of the reference are to abide the event, the word "event" is to be construed distributively, and each party will be entitled to the costs of those matters on which he succeeds.

An action, with all matters in difference, was referred to an arbitrator upon the terms that the costs of the action, the reference, and award were to abide the event. The arbitrator awarded the plaintiff a sum of 293*l. in respect of the claim in the action, and in respect of other matters in difference not included in the original action he directed that the plaintiff should do certain things:*—Held, *that the word "event" ought to be construed distributively, and that the plaintiff would be allowed the general costs of the action, and the defendant the costs of such matters in difference as he had succeeded on.*

Ellis *v.* Desilva (50 Law J. Rep. Q.B. 328; Law Rep. 6 Q.B. D. 521) *followed.*

Gribble *v.* Buchanan (18 Com. B. Rep. 691; 26 Law J. Rep. C.P. 24) *not followed.*

Appeal from the order of Denman, J., at chambers.

The facts were as follows:—The plaintiff had brought an action against the defendant for a sum alleged to be due to the plaintiff from the defendant, as incoming tenant, in respect of tenant-right on two farms let by the plaintiff to the defendant. The defendant, in his statement of defence, denied his liability, but paid into Court the sum of 493*l.*, and said that it was sufficient to satisfy the plaintiff's claim. After issue joined, the action and all matters in difference between the parties were referred to the award of an arbitrator by a Master's order, made by consent. The order of reference provided that the costs of the cause, and the costs of the reference and award, should abide the event, and that, unless restrained by an order of the Court or a Judge, the party or parties in whose favour the award should be made should be at liberty, within seven days after service of a copy of the award on the solicitor or agent of the other party, to sign final judgment in accordance with the award, and for all costs that he or they might be entitled to under the order and under the award, together with the costs of the judgment.

On the hearing of the arbitration, the defendant set up various claims against the plaintiff for breaches of an agreement for the lease of the farms. The arbitrator awarded that the defendant was indebted to the plaintiff in respect of the causes of action alleged in the statement of claim in the sum of 293*l.* 9*s.* 8*d.* beyond the amount paid into Court, which sum he awarded and directed the defendant to pay to the plaintiff; and he awarded that the plaintiff should stub a certain fence situate on the south side of certain fields included in the farms mentioned in the statement of claim, and also restore and sow down the land on which the said fence stood, on or before the 1st of January, 1886; and he further adjudged that certain fixtures in a house situate on one of the farms were the property of the plaintiff, and should not be included in the valuation of the tenant's fixtures, and he stated that they were accordingly excluded from his award. The plaintiff signed judgment upon the award against the defendant for 293*l.* 9*s.* 8*d.*, and costs to be taxed. Upon application by the plaintiff to the Master to tax the costs the defendant's solicitor took the objection that under the order of reference and the award the plaintiff was not entitled to costs, the award being partly in favour of the plaintiff and partly in favour of the defendant. The Master refused to tax the costs. The plaintiff thereupon applied to Denman, J., at chambers, for an order directing the Master to tax the costs; and the learned Judge made an order directing that the plaintiff's costs should be taxed upon the judgment, the defendant to be allowed the costs of such matters in difference as he had succeeded on, and the plaintiff to be allowed the general costs of the action. Against this order appeal was now brought.

Hawke v. *Brear.*

Houghton, for the defendant.—When on a reference of a cause and all matters in difference, the submission provides that the costs of the cause and of the reference are to abide the event of the award, the "event" is the general event of the award; and if the award be partly in favour of one party and partly in favour of the other, each party has to pay his own costs. He cited *Russell on Awards* (6th ed., p. 396), *Gribble* v. *Buchanan* (1), *Reynolds* v. *Harris* (2), and *Ellis* v. *Desilva* (3).

C. Dodd, for the plaintiff, was not called on.

MATHEW, J.—I am of opinion that the order of Mr. Justice Denman is right and that this application must be dismissed. The question depends on the meaning to be placed on the submission to arbitration. The plaintiff has recovered all he sought in the action, and the defendant has recovered on certain matters which were not made the subject of a counter-claim in the action. The submission to arbitration, which was by agreement, referred the cause and all matters in difference, and provided that the costs of the cause and the costs of the reference and award should abide the event. And we are asked to come to the conclusion that if the defendant is successful in any of the matters in difference, the plaintiff is not entitled to any of the costs of the action, although he recovered all he sought to recover in the action. But the word "event" must be construed distributively, as it is usual to construe it in actions. It has been contended that we are concluded by authority from placing this reasonable construction upon the submission; but in *Gribble* v. *Buchanan* (1), which was one of the authorities referred to, Chief Justice Jervis was evidently inclined to adopt such a construction, although he considered he was concluded by authority from doing so. The construction which that learned Judge considered to be reasonable has been adopted in modern times in *Ellis* v. *Desilva* (3), and in my judgment should be applied to the present case.

SMITH, J.—I am of the same opinion. It appears that when the cause and all matters in difference are referred, as in the present case and in *Ellis* v. *Desilva* (3), the word "event" ought to be construed distributively. It is true that in *Gribble* v. *Buchanan* (1), which was a similar case to the present, the Court were of a contrary opinion; but Chief Justice Jervis considered that he was bound by the practice, although reason was against the decision at which the Court arrived. I am glad to find that in recent times an authority which I can follow has adopted the more reasonable construction.

Order affirmed.

(1) 18 Com. B. Rep. 691; 26 Law J. Rep. C.P. 24.

(2) 3 Com. B. Rep. N.S. 267; 28 Law J. Rep. C.P. 26.

(3) 50 Law J. Rep. Q.B. 328; Law Rep. 6 Q.B. D. 521.

Solicitors—Pitman & Sons, agents for Brown, Wilkin & Scott, Wakefield, for plaintiff; S. S. Seal, agent for Rawson, George & Wade, Bradford, for defendant.

BANKRUPTCY. 1885. March 10, 23. } *In re* PEARCE; *ex parte* CROSTHWAITE.

Bankruptcy — Duties of Sheriff as to Goods taken in Execution—Several Writs in hands of the Sheriff—Sale—Proceeds of Executions upon Judgments exceeding 20*l.* *—Proceeds of Executions upon Judgments less than* 20*l.*—*Bankruptcy Act*, 1883 (46 *& 47 Vict. c.* 52), *s.* 46, *sub-ss.* 1 *and* 2.

Section 46, *sub-section* 2, *of the Bankruptcy Act*, 1883, *does not render void an execution upon a judgment for a sum exceeding* 20*l.*, *where the sheriff, within fourteen days after the sale of the goods, is served with notice of a bankruptcy petition having been presented against the debtor, upon which the debtor is subsequently adjudicated bankrupt; but merely provides that, instead of handing the proceeds of the execution over to the execution creditor, the sheriff shall hand them over to the trustee in the bankruptcy.*

The duty of a sheriff who has several writs of execution to execute is to execute first that writ which is first delivered to him; and when he has sold enough to satisfy that writ, to sell under the next in order.

In re Pearce; ex parte Crosthwaite, Bankr.

Therefore, if the proceeds of the sale of the goods of a debtor are not enough to satisfy the earlier writs in the hands of the sheriff, there can be no sale under the subsequent writs.

Where a sheriff is entrusted with the execution of several writs against the goods of a debtor, the proceeds of which are not enough to satisfy all the writs, the duty of the sheriff is to pay the amounts of the several writs in the order of priority in point of time, making the payments in the case of judgments for less than 20l. to the execution creditors, and in the case of judgments for more than 20l. to the trustee of the debtor, if within fourteen days after sale notice is served upon the sheriff of a bankruptcy petition upon which the debtor is adjudged bankrupt.

Cases decided under 6 *Geo.* 4. *c.* 16. *s.* 108, *and Ex parte* Lovering; *in re* Peacock (43 Law J. Rep. Bankr. 58; Law Rep. 17 Eq. 452) *distinguished.*

Application on behalf of Crosthwaite, an execution creditor of the bankrupt, for an order on the official receiver, as trustee, to pay over to the applicant 12*l.* 13*s.*, the amount which the sheriff was directed to levy on the goods of the bankrupt under a writ of *fi. fa.* issued at the instance of the applicant.

The facts and arguments sufficiently appear from the judgment.

H. Reed, for the applicant.

Fraser McLeod (*John Macdonell* with him), for the official receiver.

Cur. adv. vult.

CAVE, J. (on March 23), delivered judgment as follows:—In this case an application was made by an execution creditor of the bankrupt for an order on the trustee to pay over to the applicant 12*l.* 13*s.*, the amount which the sheriff was directed to levy on the goods of the bankrupt under a *fi. fa.* issued at the instance of the applicant.

In the beginning of May, 1884, the sheriff was in possession of the goods of the bankrupt under several writs, of which the first in order of priority was for 41*l.*, the second for 6*l.*, the third for 47*l.*, the fourth for 34*l.*, and the fifth, that of the applicant, for 12*l.* 13*s.*

On the 12th of May the sheriff sold all the goods which he had seized, and realised a balance, after deducting rent and other charges and expenses, of 89*l.* 19*s.*

This sum the sheriff continued to hold until the 22nd of May, when he had notice of a bankruptcy petition having been that day presented against the debtor; and subsequently, after adjudication, he paid 6*l.* to the execution creditor, whose writ was second in point of time, and handed over the balance to the trustee.

Section 46, sub-section 2, of the Act of 1883 enacts that where the goods of a debtor are sold under an execution in respect of a judgment for a sum exceeding 20*l.*, the sheriff shall deduct the costs of the execution from the proceeds of sale and retain the balance for fourteen days, and if within that time notice is served on him of a bankruptcy petition having been presented against or by the debtor, and the debtor is adjudged bankrupt thereon or on any other petition of which the sheriff has notice, the sheriff shall pay the balance to the trustee in the bankruptcy, who shall be entitled to retain the same as against the execution creditor.

Mr. Reed, for the applicant, contended that the executions held by the sheriff for sums of 20*l.* and upwards were avoided by this section, and consequently that the applicant's execution was let in, and that the sheriff ought to have paid him his 12*l.* 13*s.*

Some light will be thrown on the question by considering what is the duty of a sheriff who has several writs to execute. The case of *Aldred* v. *Constable* (1) shews that the duty of the sheriff is to execute first that writ which is first delivered to him, and when he has sold enough to satisfy that writ he should sell under the next in order. Thus, in the present case, the sheriff's duty was to sell under the first writ until he had realised a net sum of 41*l.* He was then to sell under the next writ until he had realised a further sum of 6*l.* to satisfy the second writ, and then to continue the sale under the third writ. The goods did not realise enough to satisfy the third writ, and consequently his duty to sell under the fourth and subsequent writs never arose, from want of goods to

(1) 6 Q.B. Rep. 370; 12 Law J. Rep. Q.B. 253.

sell; and as to these writs the proper return for the sheriff to make was one of *nulla bona*. Having sold all the goods, and realised only 89*l.* 19*s.*, the sheriff had in his hands 41*l.* realised under the first writ, 6*l.* realised under the second, and the balance realised under the third writ, and he had nothing in his hands under the subsequent writs. Now, applying the statute to this state of things, when the sheriff got notice of a petition and found it was followed by adjudication, he was bound to pay over to the trustee the sum he held in his hands for the first and third creditors, because their judgments were for over 20*l.*; but as to the 6*l.*, he was bound to pay that to the second creditor. The sheriff never sold under the fourth or subsequent writs, and consequently the position of those creditors cannot be better than if the sheriff had seized under their writs and not sold, in which case the 1st clause of section 46 would have applied.

Now, undoubtedly, if two writs are delivered to the sheriff successively, and the prior one is for any reason void, the sheriff must disregard it and execute the second —*Christopherson* v. *Burton* (2); and if I were satisfied that the effect of section 46 is to render writs of execution in respect of a judgment for a sum exceeding 20*l.* void, I should have to decide in favour of the applicant; but I cannot see that that is the effect of the section, which only directs the sheriff what he is to do with money he holds for the execution creditor, but nowhere enacts that the execution shall be void, although undoubtedly the effect is that the execution creditor, where his judgment is for a sum exceeding 20*l.*, loses the benefit of it.

Mr. Reed, in support of his argument, referred to some cases decided under the 6 Geo. 4. c. 16. s. 108, which it is necessary to consider. That section enacted that no creditor having security for his debt, or having made any attachment in London, or any other place, by virtue of any custom there used, of the goods and chattels of the bankrupt, should receive upon any such security or attachment more than a rateable part of such debt, except in respect of any execution or extent served and levied, by seizure upon, or any mortgage of or lien upon, any part of the property of such bankrupt before the bankruptcy: Provided that no creditor, though for a valuable consideration, who should sue out execution upon any judgment obtained by default, confession, or *nil dicit*, should avail himself of such execution to the prejudice of other fair creditors, but should be paid rateable with such creditors.

The first case under the Act appears to have been *Taylor* v. *Taylor* (3), in which the Court of King's Bench refused to set aside, at the instance of the assignees, as void an execution on a judgment *nil dicit*, where after seizure and before sale the execution debtor had become bankrupt. This case was followed by that of *Wymer* v. *Kemble* (4), in which it was held that where execution upon a judgment by default had been perfected by seizure and sale before the bankruptcy the execution creditor was entitled to the proceeds. Then came the case of *Notley* v. *Buck* (5), in which the same Court held that where the sheriff had seized the goods of an execution debtor under two executions upon judgments by *nil dicit*, and had after the execution debtor had become bankrupt sold the goods and paid the proceeds to the execution creditors, he was liable to refund the amount to the assignees; but the Court refused to decide whether he was a wrongdoer in selling under the writ.

The case of *Goldschmidt* v. *Hamlet* (6) is very imperfectly reported in *Manning and Grainger*, vol. vi. p. 187; but it appears to decide that, where the sheriff had seized under several writs before the bankruptcy, and the first of such writs was upon a judgment on a warrant of attorney, the effect of the statute was not to transfer the right of the first execution creditor to the assignees, but to avoid or supersede that execution, leaving to the other execution creditors the advantage which the Act secured to them as claiming under executions which had been levied by seizure before the bankruptcy.

In *Cheston* v. *Gibbs* (7) it was held that

(2) 8 Exch. Rep. 160; 18 Law J. Rep. Exch. 60.

(3) 5 B. & C. 392.

(4) 6 B. & C. 479; 5 Law J. Rep. (o.s.) K.B. 232.

(5) 8 B. & C. 160; 6 Law J. Rep. (o.s.) K.B. 271.

(6) 6 Man. & G. 187; 12 Law J. Rep. C.P. 304.

(7) 12 Mee. & W. 111; 13 Law J. Rep. Exch. 35.

a sheriff who *bona fide* and without notice of a prior act of bankruptcy had seized under a *fi. fa.*, was liable to the assignees in trover for selling after the fiat, the execution being founded on a warrant of attorney. This decision was arrived at on the ground that the 108th section affected the operation of the writ, and did not merely direct the application of the money levied under it: the words "no creditor shall avail himself of such execution" being held to mean that such an execution should not be carried into effect for the benefit of the creditor.

The same point which had arisen in *Goldschmidt* v. *Hamlet* (6) came before the Court of Queen's Bench in *Graham* v. *Witherby* (8), when that Court, after taking time to consider its decision, followed the previous cases, and held that where the execution was founded on a warrant of attorney the effect of section 108 was to make a sale by the sheriff after the fiat illegal, and so to let in a subsequent execution creditor on a judgment in an adverse *bona fide* action, who had seized before the fiat, and that the section did not merely transfer the produce of the sale from the first judgment creditor to the assignee.

These cases are, however, not applicable to the case now under discussion—first, because in those cases there was a subsequent sale by the sheriff which was invalidated by the express words of the section, "no creditor shall avail himself" of such execution; and, secondly, because if the first execution was void, the subsequent one, having been executed by seizure before the fiat, was within the exception contained in the 108th section.

In this case, on the contrary, there are no words in section 46, sub-section 2, which invalidate the sale by the sheriff—and, indeed, under that clause the sale must necessarily take place before it can be known whether the execution creditor will or will not ultimately be entitled to the proceeds; and, secondly, the words of the statute do seem to imply that the benefit of the execution is to be transferred from the execution creditor to the trustee for the benefit of the creditors generally. As soon as the sheriff has sold, he holds the proceeds of the sale for the execution creditors in the order of their priority; and the section simply provides that, instead of handing this money over to the execution creditor whose judgment exceeds 20*l.*, the sheriff shall hand it over to the trustee. If the sale is not invalidated, but merely the proceeds are transferred from the execution creditor whose judgment is over 20*l.* to the trustee, it follows that the sheriff in this case never sold under the applicant's writ, and never had in his hands any money to the use of the applicant, and the applicant is only an execution creditor who has seized but has not sold, and whose execution consequently is avoided by section 45.

The case of *Ex parte Lovering; in re Peacock* (9), which was decided under the Act of 1869, is also distinguishable, for in that case the execution creditor got a security by the seizure which there was nothing in the Act to take from him. Under the present Act the execution creditor gets no benefit by seizure alone. He must complete his execution by sale before the date of the receiving order. In this case the sheriff sold under the three first executions, and held the proceeds for those creditors only, and not for the present applicant.

Nor is there any injustice in this result. At common law the applicant would have got nothing by his execution; and although where the judgment is over 20*l.* the Legislature has thought fit to take from the execution creditor the benefit of the execution and give it to the creditors at large, it is impossible to understand what justice there could be in taking away from an execution creditor on a judgment over 20*l.* the benefit of his execution, not to give it to the creditors at large, but to give it to execution creditors on judgments under 20*l.* It is impossible to conceive why the one kind of judgment creditors should be favoured at the expense of the other.

Motion refused, with costs.

Solicitors — Walker & Mewburn-Walker, for Crosthwaite; W. W. Aldridge, for official receiver.

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(8) 7 Q.B. Rep. 491; 14 Law J. Rep. Q.B. 290.

(9) 43 Law J. Rep. Bankr. 58; Law Rep. 17 Eq. 452.

[IN THE QUEEN'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

BANKRUPTCY. 1885. March 5. April 24. } *In re* HOLLAND; *ex parte* WARREN.*

Execution and Sale—Notice of Bankruptcy Petition — "Sheriff" — "Officer charged with execution of process" — Mayor's Court Process—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 46, *sub-s.* 2, *and s.* 168.

The "officer charged with the execution of process," included by section 168 *of the Bankruptcy Act*, 1883, *in the term "sheriff," is the officer analogous to the sheriff so charged by the constitution of Courts other than the High Court, to whom notice of a bankruptcy petition must be given under section* 46, *sub-section* 2, *upon a sale under an execution for more than* 20*l.*

In a Mayor's Court action, the notice should be given at the office of the sergeant-at-mace to him or his representative; and a notice to sheriff's officers in possession of the debtor's goods under previous High Court writs to whom the sergeant-at-mace had entrusted the execution of his writ, given after they had paid over the proceeds to the sergeant-at-mace, was held insufficient.

Appeal of the execution creditor against the decision of Cave, J., whereby it was declared that moneys deposited in the Mayor's Court, London, to the credit of an action therein of *Warren* v. *Holland* (the bankrupt), being the proceeds of an execution levied upon a judgment in that action upon the goods of the bankrupt, are assets of the bankrupt's estate payable to the trustee.

On the 13th of October, 1884, execution issued upon a judgment of the Mayor's Court, London, in the action by Warren against the bankrupt, directing Christopher Fitch, the serjeant-at-mace of the Mayor's Court, or any other serjeants-at-mace, to levy the sum of 104*l.* 12*s.* 6*d.* upon the goods of the bankrupt. A warrant to that effect was upon the same day issued and lodged with Fitch.

* *Coram* Brett, M.R., Baggallay, L.J., and Bowen, L.J.

Previously to that date a large number of writs of executions had issued out of the High Court of Justice against the bankrupt to the sheriff of Middlesex, and warrants issued thereon had been placed in the hands of Heywood and Hillyer, the "serjeants-at-mace" to the sheriff of Middlesex, and Heywood and Hillyer were in possession of the bankrupt's goods and chattels by virtue of such warrants.

Fitch, finding Heywood and Hillyer in possession, entrusted them with the execution of the warrant issued to him.

On the 20th of October, 1884, an order was made by the Queen's Bench Division of the High Court of Justice authorising a sale by private contract of the goods and chattels of the bankrupt seized under the writs of that Court.

On the 22nd of October, 1884, an order was made by the Judge of the Mayor's Court, London, approving such sale in respect of the writs issued from that Court.

On the 29th of October, 1884, the proceeds of the sale were paid into the hands of Heywood and Hillyer, and were sufficient to answer all the several executions and expenses.

On the 30th of October, 1884, Heywood and Hillyer paid over to Fitch the sum of 104*l.* 12*s.* 6*d.*, the amount of his warrant.

On the 31st of October, 1884, the petition in bankruptcy was presented against the bankrupt.

Notice of this petition was given to Heywood and Hillyer on the 31st of October, 1884. No notice was given to Fitch.

On the 22nd of November a receiving order was made, and on the 6th of December, 1884, Holland was adjudicated bankrupt.

The proceeds of the Mayor's Court execution were still in the hands of Fitch.

By section 46, sub-section 2, of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), it is enacted: "Where the goods of a debtor are sold under an execution in respect of a judgment for a sum exceeding 20*l.*, the sheriff shall deduct the costs of the execution from the proceeds of sale, and retain the balance for fourteen days, and if within that time notice is served on him of a bankruptcy petition having been presented against or by the debtor, and the

debtor is adjudged bankrupt thereon or on any other petition of which the sheriff has notice, the sheriff shall pay the balance to the trustee in the bankruptcy, who shall be entitled to retain the same as against the execution creditor; but otherwise he shall deal with it as if no notice of the presentation of a bankruptcy petition had been served on him."

By section 168 of the same Act, "'sheriff' includes any officer charged with the execution of a writ or other process."

Upon the application to Cave, J.,

Sidney Woolf, for the trustee, submitted that Heywood and Hillyer were "the officers charged with the execution of the writ" upon Warren's judgment, within the definition of "sheriff" in section 168 of the Bankruptcy Act, 1883; and the notice to them on the 31st of October was a good notice within section 46, sub-section 2, of the Act, so as to affect the proceeds of that writ. He cited *Ex parte Villars; in re Rogers* (1).

Cooper Willis, Q.C., for the execution creditor, contended that Heywood and Hillyer were the agents of Fitch only for the purpose of selling; when these duties were at an end, they were no longer his agents, and consequently section 46, sub-section 2, did not apply.

CAVE, J.—I am of opinion that the application must be granted.

By section 46, sub-section 2, of the Bankruptcy Act, 1883, it is provided: [The learned Judge read the words of the sub-section.] Now, "sheriff" is interpreted by section 168 of the Act to "include" (not to "mean") "any officer charged with the execution of a writ or other process." In this case it is clear to my mind that the term "sheriff" did include Heywood and Hillyer, who were charged with the execution of the writ, and who did in fact execute it; and notice having been given to them, I am of opinion that this application must be granted, with costs.

The execution creditor appealed.

April 24.—*Cooper Willis, Q.C.*, for the execution creditor.

(1) 43 Law J. Rep. Bankr. 76; Law Rep. 9 Chanc. 432.

Ringwood, for the trustee.

The same arguments were submitted on both sides.

BRETT, M.R.—This statute is drawn in the modern form—that is to say, its expressions are not complete in themselves, but have to be pieced out by insertions from an interpretation clause. In the corresponding section of the Act of 1869, section 87, the words were, "the sheriff, or, in the case of a sale under the direction of the County Court, the high bailiff or other officer of the High Court." In the present section the notice is to be given to the "sheriff." If that stood alone, analogous officers in Courts other than the High Court—that is, high bailiffs, sergeants-at-mace, and others—would not be within the Act. In order to include them, the interpretation clause says that "'sheriff' shall include any officer charged with the execution of a writ or other process." That refers to any officer so charged in the same manner and sense as a sheriff is charged. It does not mean to include every bailiff acting under a sheriff, but only officers analogous to a sheriff. The notice ought to be given to such an officer in the same way as notices are given to sheriffs—that is to say, at the sheriff's office to him or to his agents authorised to receive notices—as for example, the under-sheriff. The notice in this case ought to have been given at the office of the sergeant-at-mace to him, or his deputy appointed for that part of his duty, who would be his agent for the purpose. Not only do I think no notice could have been given at all to these sheriff's officers, but I think still less that it could have been given to them after they had paid the money to the sergeant at-mace. The notice must be given to the sheriff, or the person who represents the sheriff; not to agents like sheriff's officers appointed to do part of his work, but to agents proper to receive notices for him.

BAGGALLAY, L.J.—The question is whether notice has been given within the meaning of this section. To whom is it to be given? To the sheriff. For the purpose of including corresponding officers such as the sergeant-at-mace of the Mayor's Court, section 168 is enacted. It is con-

tended that the words "officers charged with the execution of process" include all persons on whom the duty devolves. I cannot agree with that contention. The section refers to the sheriff or other officer charged to execute process by the constitution of the Court from which it issues. As to the effect of the notice if it had been served before the proceeds were handed over to the sergeant-at-mace, I do not express an opinion, but I am inclined to think that it would not have been sufficient. As soon as the agency was determined by handing over the money, I am satisfied that the officer in question was no longer the agent of the sergeant-at-mace.

BOWEN, L.J.—I am of the same opinion.

Order discharged.

Solicitors—Davidson & Morriss, for trustee; D. Blelloch, for execution creditor.

1884. Dec. 4. } BERKELEY *v.* THOMPSON AND OTHERS.

Bastardy — Jurisdiction — Service in Scotland of Summons issued in England —Bastardy Laws Amendment Act, 1872 (35 & 36 *Vict. c.* 65), *ss.* 3 *and* 4—*Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *ss.* 51 *and* 54—*Summary Jurisdiction (Process) Act*, 1881 (44 & 45 *Vict. c.* 24), *ss.* 4 *and* 6.

[For the report of the above case, see 54 Law J. Rep. M.C. 57.]

1885. March 2. } THE QUEEN *v.* JUSTICES OF MERTHYR TYDFIL.

Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *s.* 42—*Renewal of Licence—Adjournment—Objection.*

[For the report of the above case, see 54 Law J. Rep. M.C. 78.]

[IN THE COURT OF APPEAL.]

BANKRUPTCY. 1885. Jan. 16. } *Ex parte* SIBETH; *in re* SIBETH.*

Bankruptcy — Reputed Ownership — Separate Property of Wife in Possession of Husband—Marriage Settlement in Foreign Country.

A domiciled Englishman married a Prussian subject in Prussia. Prior to the marriage the intending husband and wife entered into a contract according to Prussian law whereby she became entitled to certain articles as her separate property. No trustee was appointed, but by that law the administration of the separate property of the wife belonged to the husband. The husband became bankrupt in England at a time when some of the property comprised in the contract was in his possession:— Held, *that the property was in the possession of the husband as trustee for the wife, and therefore it did not pass to the trustee in bankruptcy.*

Appeal of the wife of W. E. Sibeth, a bankrupt, from the decision of the Registrar refusing an application that certain articles which had been in the possession of the husband at the time of his bankruptcy should be delivered by the trustee to her as being her separate property.

The bankrupt was domiciled in England, and in 1846 married his wife, who was a Prussian subject, in Prussia. Before the marriage, a marriage contract was drawn up in accordance with the Code Napoléon, which was in force in the district; and it was admitted by the trustee in the bankruptcy that the effect of the contract according to Prussian law was that the wife became entitled to the articles in question, so far as they were identified, as her separate property. No trustee of the separate property was appointed by the contract, but there was evidence that under the Code Napoléon the husband was the administrator of the separate property of the wife. In October, 1883, the husband became bankrupt in England.

The Registrar having held that the trustee was entitled to the articles in question

* *Coram* Brett, M.R., Cotton, L.J., and Lindley, L.J.

as being at the commencement of the bankruptcy in the bankrupt's order and disposition as reputed owner,

The wife appealed.

Winslow, Q.C., and *G. W. Lawrance*, for the appellant.—By the Prussian law the husband is the administrator of the separate property of the wife, and, that being by virtue of a contract, that law follows him. Being an administrator, he is also a trustee, and where property is in the possession of a trustee at the time of his bankruptcy it is in proper hands.

Sidney Woolf, and *F. M. Abrahams*, for the respondent.

BRETT, M.R.—In this case, the contract having been made in Prussia must be construed according to Prussian law. There is an admission that by that law the construction of the contract is that all the property in dispute is the separate property of the wife. The bankruptcy of the husband occurred in England, so that the bankruptcy law here must be relied on in considering what property passed to his trustee. It was said that even assuming the goods to be the separate property of the wife, yet they must pass to the trustee because they were in the reputed ownership of the husband. But by the law of England, if they are the separate property of the wife and there is no other trustee, the husband is her trustee. Therefore, the mere fact of the husband being in possession of the goods does not cause them to be in his reputed ownership. Therefore the appeal must be allowed.

COTTON, L.J., and LINDLEY, L.J., concurred.

Appeal allowed.

Solicitors—A. Howard, for appellant; M. Abrahams, Son & Co., for respondent.

BANKRUPTCY. 1885. March 9. } *In re* SANDWELL; *ex parte* ZERFASS.

Bankruptcy—Disclaimer of Lease without Leave of Court—Liability of Trustee for Rent during Occupation—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 55—*Bankruptcy Rules*, 1883, *rule* 232.

The Court has no power to impose conditions upon a trustee disclaiming a lease under section 55 *of the Bankruptcy Act*, 1883, *in cases in which the trustee is entitled to disclaim without the leave of the Court.*

The debtor was the tenant of certain premises, 93 Kingsland Road, Middlesex.

On the 1st of August, 1884, the debtor was adjudicated bankrupt and an order made for a summary administration of the estate under section 121 of the Bankruptcy Act, 1883.

On the 16th of August, 1884, it was arranged between the landlord and the chief official receiver that the landlord should be paid 21*l.*, the balance of former rent due by the debtor and secured by bill of exchange, and should give leave to the chief official receiver to hold a sale upon the premises, the landlord's leave being necessary under the terms of the lease. The landlord was also paid a quarter's rent due on the 24th of June, 1884, for which he had a right to distrain. The sale was held on the 29th of August, 1884.

Notice to disclaim was given on the 8th of September, 1884, and possession taken by the landlord on the 18th of September following.

The landlord now applied to the Court for an order upon the chief official receiver to pay out of the debtor's estate 36*l.* 18*s.* for rent due during the occupation of the premises between the 24th of June and the 19th of September, 1884.

F. C. Willis, for the landlord, contended, first, that the trustee in fact agreed to pay the landlord for the occupation of the premises from the 24th of June to the 19th of September, 1884; and, secondly, that, even if there were no such agreement, it was just that payment should be made for such occupation, and the Court had power to

In re Sandwell; ex parte Zerfass, Bankr.

order the trustee to do so. He cited *Ex parte Izard; in re Bushell* (*No.* 2) (1).

Muir MacKenzie, having referred upon the first point to the evidence to shew that there was in fact no agreement by the trustee to pay the rent claimed, submitted, upon the second point, that as soon as there was a valid disclaimer by the trustee, he was not liable for rent from the date of the vesting in him of the debtor's property —Bankruptcy Act, 1883, s. 55, sub-s. 2; where the trustee is obliged to come to the Court for leave to disclaim, the Court has power to impose terms—section 55, sub-section 3; but, as the trustee was not obliged to obtain the leave of the Court here, this being a summary administration —section 55, sub-section 3; Bankruptcy Rules, 1883, rule 232*b*—the Court had no power to make the order asked for. He referred to *Reed* v. *Harvey* (2).

Willis, in reply.

CAVE, J.—The first point I have to determine is, whether in point of fact there was an agreement by the official receiver to pay rent during the period for which the claim is made. Upon that point I find that there was no agreement. Then as to the second part of the case, have I any authority to order the official receiver to pay for the occupation of these premises during the sale of the debtor's goods, and afterwards until the 19th of September? I cannot make the order if the Act does not give me the power. My powers are strictly limited by the terms of the Act and the rules made thereunder. The section of the Act which deals with this matter is section 55, which provides by subsection 2 that a disclaimer of onerous property by a trustee shall operate to discharge the trustee from all personal liability in respect of the property disclaimed, as from the date when the property vested in him. Then follow powers I am allowed to exercise before permitting the trustee to disclaim. When the trustee comes before me to obtain leave to disclaim I may impose conditions of granting leave; but my powers to do so are express. Consequently, if the trustee is not obliged to come to me before disclaiming, my power to impose terms is clearly gone. Then there are general rules which allow the trustee to disclaim without leave in certain cases, of which the present case is one. Whether this matter was considered by the Legislature or not, I cannot say, but the effect is that the trustee here can disclaim without coming before me, and therefore my power to impose terms is gone. Therefore, I have no power to make the order asked for, and the application must be refused, with costs.

Application refused, with costs.

(1) Law Rep. 23 Ch. D. 115.
(2) 49 Law J. Rep. Q.B. 295; Law Rep. 5 Q.B. D. 184.

Solicitors—R. Ward, for Zerfass; W. W. Aldridge, for official receiver

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1885. March 11, 20.

THE ATTORNEY-GENERAL (*informant*) *v.* THE MARQUIS OF AILESBURY AND OTHERS (*defendants*).

Revenue — Probate Duty — Money invested in Land—Order of Lords Justices in Lunacy — Conveyance to Heirs and Assigns—Intention to consider Land as Personalty.

By order of the Lords Justices of Appeal sitting in Lunacy, the accumulations of the personal estate of a lunatic were invested in the purchase of land, and conveyances were made to the use of the committees of the lunatic, their heirs and assigns, upon trust for the lunatic, his executors, administrators, and assigns; certain powers of leasing and sale were given to the committees, and declarations were inserted in each conveyance that the premises thereby granted were to all intents and purposes to be considered as part of the personal estate of the lunatic: —Held, *that the accumulations so invested were liable to probate duty.*

1. Information by the Attorney-General to recover the duty payable under the Customs and Inland Revenue Act, 1881, in respect of certain investments representing portions of the personal estate and effects of Sir Henry Meux, late of 36 Grosvenor Square, in the county of Mid-

dlesex, baronet, deceased, of whose will the defendants are the executors, and have applied for and obtained probate in England.

2. By an inquisition dated the 17th of June, 1858, under an order of the Lords Justices of Appeal sitting in Lunacy, the said Sir Henry Meux was found to be of unsound mind, and the defendant, then Lord Ernest Bruce, now Marquis of Ailesbury, and Richard Arabin, were appointed committees of his estate, and upon the death of the said Richard Arabin in 1865, Viscount Malden was appointed a committee, and on the death of the said Viscount Malden, William St. Julian Arabin was similarly appointed. The said Sir Henry Meux continued of unsound mind until his death, and his estate was managed and administered by the said committees, acting under the orders of the Lords Justices sitting in Lunacy. Very large sums of money, part of the personal estate of the said Sir Henry Meux, accumulated in Court to the credit of the lunatic's estate, and these sums, with the sanction of the said Lords Justices, were expended from time to time by the committees of the lunatic in the purchase of land, the amount so expended exceeding one million pounds sterling.

3. The defendants allege that the following is a correct list of the purchases so made, and of the dates of the conveyances thereof to the committees as trustees for the personal estate of the said lunatic.

[Here follows a schedule of the property purchased.]

4. All the said purchases were directed to be carried out by orders in Lunacy specially applied for on each occasion. In the first and third purchases of land by the said committees (namely, those the conveyances whereof are dated the 28th of March, 1862, and the 14th of March, 1865) the conveyances were directed by the orders approving the purchases to be made, and were in fact made, to the use of the trustees, their heirs and assigns, upon trust to raise the amount of the purchase-money, and subject thereto upon trust for Sir Henry Meux, his heirs and assigns. In all the purchases (excepting the first and third) the conveyances are to the use of the committees, their heirs and assigns, in trust for Sir Henry Meux, his executors, administrators, and assigns, and there are declarations in each case that the premises granted are to all intents and purposes to be considered as part of the personal estate of the said Sir Henry Meux. The conveyances were drawn in conformity with the terms of the several orders of the Court sanctioning the respective investments, the intention (as the informant submits) and the legal effect being that the nature and character of the property as part of the personal estate of Sir Henry Meux should not be in any way altered by the fact of the investments being made, and that it should remain personal estate of the lunatic at his death.

5. The following statement shews the form of the conveyance made of the Wootton Bassett estate, and all the other conveyances (with the exception of the two above mentioned) were to the like purport and effect. By an indenture dated the 30th of June, 1866, expressed to be made between the Right Hon. George William Frederick Earl of Clarendon, K.G., of the first part, Sir Henry Meux, Baronet, of the second part, and the Right Hon. Ernest Augustus Charles Brudenell Bruce, commonly called Lord Ernest Bruce, and the Hon. Arthur de Vere Capel, commonly called Viscount Malden, of the third part, reciting an agreement in writing bearing date the 19th of June, 1865, and made between the said George William Frederick Earl of Clarendon of the one part, and the said Sir Henry Meux by the said Lord Ernest Bruce and Richard Arabin, the then committees of his estate, of the other part, for the purchase, subject to the approval of the Lord Chancellor, for the price of 225,000*l.*, exclusive of timber, of the manors, advowson, messuages, farms, land, tenements, and hereditaments thereinafter described; and reciting that by virtue of an order dated the 24th of November, 1865, and a certificate of Francis Barlow, Esq., one of the Masters in Lunacy, dated the 3rd of February, 1866, both made in the said matter of the lunacy of the said Sir Henry Meux, the said Lord Ernest Bruce and Viscount Malden were the committees of the estate of the said Sir Henry Meux; and reciting that by an order of the 23rd of February, 1866, and made in the said matter, it was

upon the petition of the said Lord Ernest Bruce and Viscount Malden ordered that the said Masters in Lunacy should settle and approve of a proper conveyance of the estate comprised in the said agreement of the 19th of June, 1865, to the petitioners or some other proper parties, in trust for the said Sir Henry Meux, his executors, administrators, and assigns, with a declaration that the said estate was to be considered as part of the personal estate of the said Sir Henry Meux, and with powers of sale, exchange, and leasing, with the provision that during the continuance of the unsoundness of mind of the said Sir Henry Meux and until the proceedings in the said matter should be superseded, such powers were not to be exercised without the approval of the Lord Chancellor or the Lords Justices of her Majesty's Court of Appeal, entrusted by virtue of the Queen's sign manual with the care and commitment of the custody of idiots and lunatics and their estates, and that the rest of the petition should stand over and come on to be heard with the Master's certificate of his approval of the said conveyance; and reciting that the Masters in Lunacy had settled and approved of those presents as a proper conveyance to be executed in pursuance of the last-recited order; and reciting that by an order dated the 25th of May, 1866, and made in the said matter on the petition of the said Lord Ernest Bruce and Viscount Malden, it was amongst other things ordered that the said agreement dated the 19th of June, 1865, should be carried into effect on behalf of the said Sir Henry Meux: It was witnessed that in pursuance and performance of the said agreement of the 19th of June, 1865, and in consideration of the sums of 225,000*l.* and 7,357*l.* 9*s.* 10*d.* sterling (being the price of timber), making together the sum of 232,357*l.* 9*s.* 10*d.* sterling, to the said Earl of Clarendon paid at or immediately before the execution of those presents by the Accountant-General of the Court of Chancery out of a fund standing to the credit of the matter of Sir Henry Meux, Baronet, a person of unsound mind, and which fund formed part of the personal estate of the said Sir Henry Meux, the said Earl of Clarendon conveyed the manor, lands, and hereditaments thereinafter particularly mentioned, situate in the parishes of Wootton Bassett and Lydiard Tregooze, in the county of Wilts, with the appurtenances, unto and to the use of the said Lord Ernest Bruce and Viscount Malden, their heirs and assigns for ever, upon trust for the said Sir Henry Meux, his executors, administrators, and assigns; and certain powers of leasing and sale were given to the said trustees over the said hereditaments. And it was thereby declared that the manors, advowsons, hereditaments, and premises thereinbefore expressed to be thereby granted, were to all intents and purposes to be considered as part of the personal estate of the said Sir Henry Meux.

6. The said Sir Henry Meux, being still of unsound mind, died on the 1st of January, 1883. By his will dated the 8th of August, 1856, and a codicil dated the 3rd of July, 1857, the said Sir Henry Meux had made certain dispositions of his real estate and also of his personal estate, and the said will and codicil were duly proved by the defendants the Marquis of Ailesbury, Richard Hunter, and Charles Baring, the executors therein named, on the 20th of February, 1883, in her Majesty's Court of Probate. Pursuant to the Customs and Inland Revenue Act, 1881, the defendants made an affidavit on applying for probate as to the amount of the personal estate of the said Sir Henry Meux, but in such affidavit they did not include the value of the hereinbefore-mentioned investments, except the first and third, which they did include. The defendants contend that, notwithstanding anything in the orders of the Court or in the conveyances of the said properties, these investments, so far as fiscal purposes are concerned, are not part of the personal estate and effects of the deceased, and that the value thereof ought not to be included in the affidavit for probate, and they decline to pay the duty thereon unless compelled by the decision of a competent legal authority.

Sir H. James (*The Attorney-General*) and *Vaughan Hawkins* appeared in support of the information.

Horace Davey, Q.C., and *Arthur Leach*, for the defendants.

Attorney-General v. *Marquis of Ailesbury.*

The arguments are sufficiently dealt with in the judgment; the following authorities were cited—*Awdley* v. *Awdley* (1), *Ex parte Annandale* (2), *In re Badcock* (3), *In re Pares* (4), *The Attorney-General* v. *Hubbuck* (5), *The Attorney-General* v. *Brunning* (6), *The Advocate-General* v. *Anstruther* (7), *Tait* v. *Lathbury* (8), *The Attorney-General* v. *Mangles* (9), *Curteis* v. *Wormald* (10), *Oxenden* v. *Compton* (11), *Matson* v. *Swift* (12), *Freer* v. *Freer* (13), *Lewin on Trusts* (14), and *Elmer's Lunacy Practice.*

Cur. adv. vult.

The judgment of the Court (Mathew, J., and Smith, J.) was delivered on the 20th of March by

SMITH, J.—The question in this case is whether the sum of about a million sterling, which was formed out of the accumulations of the personal estate of the late Sir Henry Meux after he became lunatic, and was invested in the purchase of land, is or is not liable to probate duty. On the 17th of June, 1858, under an order of the Lords Justices sitting in Lunacy, Sir Henry Meux was found to be of unsound mind, and the Marquis of Ailesbury and another were appointed committees of his estate.

Prior to his becoming insane, as appears from the statement of counsel in the course of the argument, Sir Henry Meux had executed a will by which he declared, amongst other things, that all accumulations which might accrue from his personal estate were to be invested in consols and other stocks, and were to be considered part of his residuary personal estate. By the will his eldest son was made residuary legatee of the personalty and devisee of the realty.

Between the 17th of June, 1858, and the date of the death of Sir Henry Meux, the accumulations of his personal estate were paid into Court to the credit of his estate, and from time to time, upon petition of the committees, the Lords Justices of Appeal sitting in Lunacy ordered that such accumulations should be invested in the purchase of lands, and that the Masters in Lunacy should settle and approve of proper conveyance on the behalf, and declared that the lands so purchased should be considered as part of the personal estate of the lunatic, and that the conveyances should contain terms of such exchange and leasing usual in cases of settlement of real estate.

Pursuant to these orders estates were from time to time purchased by the committees by means of the accumulations above mentioned, and conveyances of real estates were accordingly settled and afterwards approved by the Masters in Lunacy. Certain of the estates so purchased were conveyed to the committees, their heirs and assigns, to the use of the said committees, their heirs and assigns, upon trust for Sir Henry Meux, his heirs and assigns for ever, and in these conveyances there were contained declarations by the committees that the lands conveyed should be vested in them upon trust to raise the purchase-moneys as therein mentioned, and to pay the same when levied to Sir Henry Meux, his executors, administrators, and assigns.

As to the portions of the accumulations which were so invested no question arises. Probate duty has been duly paid thereon, and it was not suggested that such moneys, though invested in land, and remaining so invested at the date of the death of the lunatic, did not form part of his personal estate and therefore liable to probate duty.

It happened, however, that conveyances in a different form were taken of the other estates purchased by means of the residue of the accumulations pursuant to the orders of the Lords Justices above mentioned, and it was contended by the defendants that by reason of the form of such conveyance the accumulations so invested were to be held to be part of the

(1) 2 Vern. Ch. Rep. 192.
(2) 1 Amb. Rep. 80.
(3) 4 Myl. & Cr. 440.
(4) Law Rep. 12 Ch. D. 333.
(5) 53 Law J. Rep. Q.B. 146; Law Rep. 13 Q.B. D 275.
(6) 8 H.L. Cas. 243; 30 Law J. Rep. Exch. 379.
(7) 13 Sc. Sess. Cas. (2nd Series), 450.
(8) 35 Beav. 112; Law Rep. 1 Eq. 174.
(9) 5 M. & W. 120.
(10) Law Rep. 10 Ch. D. 172.
(11) 2 Ves. jun. 69.
(12) 8 Beav. 368; Law Rep. 7 Chanc. App. 192.
(13) Law Rep. 22 Ch. D. 622.
(14) 7th ed. sect. 27, p. 397.

real and not the personal estate of the lunatic, and consequently not liable to probate duty.

It was argued for the Crown that a rule existed to the effect that the Lords Justices would not vary or change the property of a lunatic so as to alter the succession thereto, and the cases of *Awdley* v. *Awdley* (1), *Ex parte Annandale* (2), *In re Badcock* (3), and *In re Pares* (4) were cited in support of the contention. The existence of this rule was disputed by the defendants. It appears to us, however, that the rule does exist; but be that as it may, in our judgment the Lords Justices clearly expressed their intention in their orders to this effect—that they did not intend to vary or change the property of the lunatic so as to alter the succession thereto, and that the accumulated personal estate of the lunatic to all intents and purposes should be considered as part of his personal and form no part of his real estate.

The accumulations of the personal estate of the lunatic were to be invested in lands, and only, as it seems to us, for safe and secure investment until either the lunacy should be superseded or the lunatic died, whichever event should first happen. It was argued by Mr. Davey, on behalf of the defendants, that the conveyances were alone to be looked at, and that they must be construed as if they had been executed by Sir Henry Meux himself when sane, and without reference to the orders made by the Lord Justices sitting in Lunacy, and that by the construction of the conveyances the property was to be enjoyed as realty and not as personalty, and that such, in fact, was the effect of the conveyance. He argued that to constitute the property in question personal property at the date of the death of the lunatic, and thereby liable to probate duty, an imperative trust for sale ought to have been inserted in the conveyance itself whereby the realty was to be converted into personalty, and that no such trust was to be found in the present conveyance; that, even if an implied trust for sale would suffice, there must be shewn to exist a binding agreement by the testator to sell and convert the land into money, or a direction to sell not dependent upon the election of the testator. He cited the cases of *Matson* v. *Swift* (12), *The Attorney-General* v. *Brunning* (6), and *The Attorney-General* v. *Hubbuck* (5) in support of this argument. He also insisted that no implied trust for sale at all could be held to exist in the present case, because there was an express trust for sale contained in the conveyance which negatived the existence of any implied trust. He also argued that a trust is only to be implied when it is necessary, and it could not be necessary in the present case, inasmuch as by the will of Sir Henry Meux his eldest son was made residuary legatee of both personalty and realty, and that consequently there was no one capable of calling for a conversion, and that therefore no trust for sale could be implied.

In the first place we think that the contention that in this case the conveyances ought only to be looked at cannot be maintained. The deeds recite the orders of the Lords Justices, and proceed to convey the estates purchased by means of the accumulations to the committees upon trust for Sir Henry Meux, his executors, administrators, and assigns, until either the inquisition as regards the lunatic's unsoundness of mind is superseded, or until his death, whichever should first happen, and until such time the grantees are invested with powers of leasing, selling, or exchanging. In our judgment, the clear intention as expressed by the documents is, that the personalty of the lunatic should continue as personalty, and should not form part of his real estate. We do not doubt that where in a conveyance there is an express trust for sale—or, indeed, an implied trust, as contended for by Mr. Davey—money, though invested in land at the date of the testator's death, would be held chargeable with probate duty—and this is admitted; yet it by no means follows that it is in such cases only and in none other that moneys so invested are to be held to be personalty and liable to duty. No case was produced to shew that this was so. The principle upon which, as it seems to us, that the existence of an express or an implied trust for sale has been held sufficient to render moneys invested in land personalty is that such trusts indicate sufficiently the intention of

the person so investing that his personalty, though invested in land, should remain personalty, and so liable to probate duty. We think that these are not the only ways by which such an intention can be indicated.

Even assuming, as Mr. Davey contends, that there is not such an implied trust for sale as would indicate such intention, yet we are of opinion that the intention is clearly expressed in the case by the order of the Lords Justices, and the conveyance consequent thereon, as was said by Lord Murray in the case of *The Advocate-General* v. *Anstruther* (7). If the object of the instrument is simply to obtain security, and not to change its character from personalty to realty, then, though the personalty may be invested as realty, personalty it remains, and liable to the fiscal duties as such.

In our judgment, the case of *The Attorney-General* v. *Mangles* (9), which was pressed upon us, in no way conflicts with this. All that was decided in that case was that that which had been realty, and was realty, still remained realty, although a testator had made a declaration in his will that it should be considered as personalty at his death. Here the subject-matter which was originally personalty was ordered by competent authority to retain its character though invested for a time in land. Why is not an express declaration of equal avail to the implication of intention to be derived from the mere fact of trusts for sale being included in the conveyance? In our judgment it is.

A further point was taken by Mr. Leach on behalf of the defendants, though it was not argued or taken by Mr. Davey, which was that the Lords Justices had no power to order and declare that the then accumulations to be invested in land should be considered personalty and form part of the lunatic's personal estate. He argued that —inasmuch as by the Lunacy Regulation Act, 1853, section 119, a power was given to the Lords Justices to order when lands were sold that the then proceeds should go to the heir, there being no provision for the converse case—namely, that when personalty was invested in realty the proceeds should go to the next-of-kin—therefore the Lords Justices acted without authority in making the order which they did. And he also cited *Freer* v. *Freer* (13) before Mr. Justice Chitty. The decision in that case in no way supports his proposition. We do not doubt that the Lords Justices sitting in Lunacy have followed what we understand to have been a long and well-established practice, and certainly one which is sanctioned by the book of practice upon the subject (see *Elmer's Lunacy Practice*), and we are of opinion that they had full power to do what they did.

In our judgment the accumulations in this case are liable to probate duty, and we give judgment for the Crown, with costs.

Judgment for the Crown.

Solicitors—The Solicitor of Inland Revenue, for informant; Hunters, Gwatkin & Haynes, for defendants.

1884. Nov. 21, 22. THE QUEEN *v.* THE OVERSEERS OF ST. MARY MAGDALENE, BERMONDSEY.

Poor — Rate — Assessment — Valuation Metropolis Act (32 & 33 *Vict. c.* 67), *ss.* 46 *and* 47*—Provisional List—Alteration in Value—Discretion of Overseers as to sending in Provisional List—Mandamus.*

[For the report of the above case, see 54 Law J. Rep. M.C. 68.]

1884. Dec. 16. LANE (*appellant*) *v.* COLLINS (*respondent*).

Sale of Food and Drugs Act, 1875, *s.* 6 *—Article of Food—Sale to Prejudice of Purchaser—Skimmed Milk.*

[For the report of the above case, see 54 Law J. Rep. M.C. 76.]

[IN THE COURT OF APPEAL.]

1885. April 29. THE QUEEN *v.* THE JUDGE OF THE CITY OF LONDON COURT AND CLAXTON AND MASKELL.*

Practice—Action under the Employers' Liability Act (43 & 44 *Vict. c.* 42), *s.* 6—*Removal of, into High Court—Stay of Proceedings in County Court*—19 & 20 *Vict. c.* 108. *s.* 39.

The Employers' Liability Act (43 & 44 *Vict. c.* 42), *which provides by section* 6 *that actions brought under it shall be brought in a County Court, but may be removed by either party into a superior Court in like manner and upon the same conditions as an action commenced in the County Court may be removed, does not so incorporate all the provisions of the County Courts Act*, 1856 (19 & 20 *Vict. c.* 108. *s.* 39), *as to entitle the defendant, when action is brought claiming more than* 5*l.*, *to give notice that he objects to the action being tried in the County Court, to give security, and thereupon to have all the proceedings in the County Court stayed.*

Judgment of the Queen's Bench Division affirmed.

Appeal by the defendants in two actions of *Claxton* v. *Lucas & Aird* and *Maskell* v. *Lucas & Aird* from the judgment of the Queen's Bench Division discharging a rule *nisi* for a prohibition to the Judge of the City of London Court.

The case is reported *ante* p. 301, *sub nom. Claxton* v. *Lucas & Aird.*

The plaintiffs brought two actions in the City of London Court pursuant to the Employers' Liability Act (43 & 44 Vict. c. 42), and under section 6 of that Act they brought them in that Court as the County Court for the district, and in each action 300*l.* was claimed as damages for injuries received.

The defendants gave notice, under 19 & 20 Vict. c. 108. s. 39, that the actions were actions of tort in which more than 5*l.* was claimed, and that they objected to the action being tried in the County Court; and upon their giving security the actions were stayed.

The plaintiffs thereupon brought actions in the High Court; but being advised that the High Court had no jurisdiction to try them, they afterwards discontinued those actions and applied to the Judge of the City of London Court to remove the stay of proceedings, to restore the actions in that Court to the list, and to try them.

The Judge granted the application.

The defendants then obtained a rule *nisi* for a prohibition to the Judge, which was afterwards discharged.

The defendants appealed.

McCall, for the appellants.—These actions are actions for tort, in which a sum exceeding 5*l.* is claimed; they are therefore within 19 & 20 Vict. c. 108. s. 39. The Employers' Liability Act (43 & 44 Vict. c. 42) does not exclude the operation of that Act, for it provides in section 6 that the actions brought under it may be removed into a superior Court in the same way as an action begun in the County Court: so that the defendants are entitled to the procedure pointed out in 19 & 20 Vict. c. 108. s. 39, and then all proceedings in the County Court are to be stayed. The Employers' Liability Act does not create a new cause of action; it merely prevents the defendant from setting up a certain defence.

Horne Payne and *G. S. Bower*, for the plaintiffs, were not called on.

BRETT, M.R.—I am of opinion that this prohibition cannot be granted, and therefore that this appeal must fail. The Employers' Liability Act (43 & 44 Vict. c. 42) provides by section 6 that "Every action for recovery of compensation under this Act shall be brought in a County Court, but may, upon the application of either plaintiff or defendant, be removed into a superior Court in like manner and upon the same conditions as an action commenced in a County Court may by law be removed."

The words "under this Act" shew that before this statute the things which are by it made causes of action were not causes of action in any Court before this statute was passed. That statute may be said to have invented five new causes of action, and the statute which gives the new causes of action also gives the remedy.

* *Coram* Brett, M.R., Baggallay, L.J., and Bowen, L.J.

That remedy is to be sought in the County Court, and I am inclined to think that the High Court would have no jurisdiction to try those causes of action. Then the section says that the action may be removed; if it were so removed, then the High Court would of course have jurisdiction to try the cause of action.

Even if it be not true that these five causes of action are new causes of action, still the five causes of action are enumerated in the statute, and the statute also points out the remedy: the action is to be removed in the manner and on the same conditions as an action commenced in a County Court may be removed; but that does not introduce the provisions as to stay which are contained in section 39 of 19 & 20 Vict. c. 108 into the Employers' Liability Act, it only introduces the parts of that section which apply to the mode of removal. If it be said that orders for the removal of actions under the Employers' Liability Act have been often refused, then I would say that I should think the refusal was right, for the statute states clearly that the County Court is the tribunal in which the action is to be tried, and I do not think such an action ought to be removed simply because of the amount of the damages claimed, unless some difficult question of law is raised or the facts are very complicated; but if it be said that the refusal to remove has been based on an idea that 19 & 20 Vict. c. 108. s. 39 applies so as to entitle the defendant to a stay of proceedings on his giving notice and security under that section, then I am of opinion that that idea is based on an erroneous construction of the Employers' Liability Act.

BAGGALLAY, L.J., and BOWEN, L.J., concurred.

Appeal dismissed.

Solicitors—Ranger & Burton, for plaintiffs; Cope & Co., for defendants.

BANKRUPTCY. 1885. March 4, 11. } *In re* SANDERS; *ex parte* SERGEANT.

Landlord and Tenant—Distress—Agricultural Holdings (England) Act, 1883 (46 & 47 *Vict. c.* 61), *ss.* 52 *and* 61—*Authority to act as Distress Bailiff—Area of Authority.*

A distress was levied upon a holding to which the Agricultural Holdings (England) Act, 1883, *applied, by a person having authority to act as a bailiff under the Act from a County Court Judge but not from the Judge of the County Court district where the holding was situate*:—Held, *that the enactment of section* 52—*that "no person shall act as a bailiff to levy any distress on any holding to which this Act applies unless . . . . authorised to act as a bailiff by . . . . the Judge of a County Court"—was satisfied by authority from the Judge of any County Court, notwithstanding the enactment of section* 61 *that "'County Court' in relation to a holding means the County Court within the district whereof the holding or the larger part thereof is situate."*

This was an appeal against an order of the York County Court, whereby it was declared that a distress levied upon farming stock and other chattels of Sanders by the appellant (Sergeant), for rent due to one Rhodes, was an illegal distress, as made on a holding to which the Agricultural Holdings (England) Act, 1883 (1),

(1) 46 & 47 Vict. c. 61. s. 52: "From and after the commencement of this Act no person shall act as a bailiff to levy any distress on any holding to which this Act applies unless he shall be authorised to act as a bailiff by a certificate in writing under the hand of the Judge of a County Court; and every County Court Judge shall on or before the 31st of December, 1883, and afterwards . . . . as occasion shall require appoint a competent number of fit and proper persons to act as such bailiffs as aforesaid. If any person so appointed shall be proved to the satisfaction of the said Judge to have been guilty of any extortion or other misconduct in the execution of his duty as a bailiff, he shall be liable to have his appointment cancelled by the said Judge."

Section 61: "In this Act . . . 'County Court' in relation to a holding means the County Court within the district whereof the holding or the larger part thereof is situate."

applied, by a bailiff not authorised to act as a bailiff in respect of that holding, and it was ordered that the appellant should pay the proceeds of the levy to the official receiver. The material facts appearing were as follows:—The debtor, Sanders, a farmer, of Wetherby, in the county of York, was tenant to Rhodes of a holding to which the Agricultural Holdings (England) Act, 1883 (1), applied, situate within the district of the County Court holden at Tadcaster. The appellant, an auctioneer (on the 30th of October, 1884), under instructions from Rhodes, levied the distress in question upon that holding. The appellant had no certificate from the Judge of the Tadcaster County Court authorising him to act as a bailiff under the Act (1), but had a certificate under the Act from another County Court Judge, of which the following is a copy:—"I, Francis Alfred Bedwell, Judge of County Courts, by this certificate given under my hand in pursuance of the power entrusted to me by the Agricultural Holdings (England) Act, 1883, do authorise and appoint Harry Sergeant, of Selby, in the county of York, . . . to act as a bailiff under the said Act. F. A. Bedwell, Judge. Hull, December 15, 1883." A receiving order was made in the matter of Sanders' estate on the 4th of November, 1884, and the official receiver on the 9th of December, 1884, obtained the order now appealed against.

A. C. Nicoll, for the appellant.—The Act (1) requires only that a bailiff levying a distress upon a holding to which the Act applies shall have been authorised to act as a bailiff by the Judge of "a County Court." Consequently, the appellant being authorised to act as a bailiff under the Act by the Judge of a County Court, though not by the Judge of the County Court of the district where the holding was situate, the distress was not contrary to the Act. Even if contrary to the Act it would not be void.

M. J. Muir Mackenzie, for the respondent.—On the true construction of the Act (1) the bailiff must be appointed by the Judge of the County Court of the district where the holding or the larger part thereof is situate, in accordance with the interpretation of "County Court" contained in section 61. That construction harmonises entirely with the language and provisions of section 52. For a person cannot be "authorised" to act as a bailiff beyond the area of the authority of the Judge appointing him; nor can a County Court Judge know how to "appoint a competent number of fit and proper persons to act as" bailiffs, if the area within which they are to act is not to be the area of his own jurisdiction, with the needs of which he is presumably acquainted, but England at large, with all the other County Court Judges of England appointing bailiffs for the same area; and, further, section 52 goes on to say that "if any person so appointed shall be proved to the satisfaction of *the* said Judge to have been guilty of . . . . misconduct . . . . he shall be liable to have his appointment summarily cancelled by the said Judge." The construction placed upon the Act by the County Court Judge was therefore right.

Nicoll, in reply.—The interpretation clause as to "County Court" can only be referred to where the Act speaks of a County Court in relation to a holding, which is not the case in section 52. Where the Act means a particular County Court, it says "the County Court," instead of saying, as in section 52, "a County Court." Thus section 9, dealing with references under the Act, says, by sub-section 6, if either party fails to appoint a referee, "the County Court shall . . . . appoint . . . . a referee"; and section 10 and section 11 in like manner use the words "the County Court." Section 23, section 26, section 27, and section 29 also say "the County Court." And generally throughout the Act, wherever a particular County Court, instead of any County Court, is meant, the language used is different from the language of section 52.

CAVE, J.—This is a case raising a question of great importance in reference to the construction of section 52 of a very important Act, the Agricultural Holdings (England) Act, 1883 (1). That section says: [His Lordship read it.] It is, I think, quite clear that, grammatically, the words "under the hand of the Judge of a County Court" mean under the hand of the Judge

of any County Court. Is there anything to displace that grammatical construction? I think not. The interpretation clause in section 61, which says that "In this Act . . . . 'County Court' in relation to a holding means the County Court within the district whereof the holding or the larger part thereof is situate," does not, I think, apply at all where the Act speaks of "a County Court" and not of "the County Court." There are cases where the expression "the County Court" clearly is used not "in relation to a holding," but in relation to something else—for instance, the residence of some person concerned. On the other hand, there are cases where the expression "the County Court" is used in relation to a holding. But what ground is there for applying the interpretation clause here, where the expression used is "a County Court"? The object of the Legislature in this enactment of section 52 obviously was to prevent misconduct by a bailiff employed to levy a distress; and with that view the Legislature has required that the bailiff shall be a person approved of by a County Court Judge. No doubt, in entrusting to the County Court Judges the power of appointing persons who might be employed as bailiffs, the Legislature took into account the knowledge which each Judge would presumably possess of what would probably be the practical needs of his district; but the Legislature has not, I think, shewn any intention of limiting the area within which a bailiff might lawfully act to the area of the jurisdiction of the Judge appointing him. I think that the construction put upon the Act by the learned County Court Judge was wrong, and that a County Court Judge has power to appoint a bailiff who may levy a distress anywhere. That is enough for the determination of the matter before us; but I must say also that I should hesitate to yield to the second contention necessary to the support of the respondent's case; I am not satisfied that if the distress contravened the Act it would be void. I am of opinion that the order of the County Court Judge must be reversed.

WILLS, J.—I am of the same opinion. To begin with, the grammatical construction of section 52 appears to me to be perfectly plain. But, however plain the section in itself may be, we must give effect to the interpretation clause if it applies. Is, then, the phrase "County Court" in section 52 used in relation to a holding? That is the question. I think the phrase is not so used. And that view is completely borne out if one examines the rest of the Act. The only places where the expression "a County Court" is used, besides section 52, are section 24, section 30, and section 32. In all other cases where the words "County Court" are used they are preceded by the definite article "the," the use of which necessitates a reference to some source of interpretation or other for the purpose of ascertaining what County Court is meant. Of the three cases in which the indefinite article "a" is used, two, namely section 30 and section 32—the former speaking of "the sum charged by the order of a County Court under this Act," and the latter speaking of "an assignment of any charge made by a County Court under the provisions of this Act"—clearly mean simply the County Court to which jurisdiction is given, and throw no light upon the question what County Court it is to which jurisdiction is given. In the only other case of the use of the indefinite article before County Court, namely section 24—saying that under certain circumstances money "shall be recoverable upon order made by the Judge of the County Court as money ordered by a County Court under its ordinary jurisdiction to be paid is recoverable"—it is quite clear that "a County Court" does not mean a particular County Court. There is thus no instance in the Act, unless this section 52 is one, where the expression "a County Court" is used as meaning a particular County Court. And there is no looseness of phraseology elsewhere in the Act to prepare one for finding language used improperly in the provisions which we have to construe; on the contrary, language is used in this Act rather more carefully than in Acts of Parliament generally. Thus, whether one looks to the language of section 52 itself or to the language of the Act generally, there is nothing in either to countenance the conclusion that in section 52 the expression "County Court" is used "in relation to a holding." And, the sole object of section

In re Sanders; ex parte Sergeant, Bankr.

52 being that only proper persons shall act as bailiffs, the object of the section is equally satisfied upon our construction.

That disposes of the case; but I will add, as to the question whether the distress if contrary to the Act would be void, that I see nothing in the Act of a nature to cause a person construing it (however much he may sympathise with its provisions) to read it as going beyond its letter, and that the proposition that the distress would be void appears to me to be a startling one. I do not feel it necessary to say more upon that point, having come to the conclusion that the respondent's case fails upon the first of the two points necessary for maintaining it.

Order appealed from rescinded.

Solicitors—Williamson, Hill & Co., agents for James Coates, Wetherby, for appellant; Reader & Hicks, agents for B. B. Thompson, Tadcaster, for respondent.

1885. April 16, 18.

MOGG *v.* CLARK.

Penalty—Common Informer—Vestry—Qualification—Occupation—Assessment to Poor Rate—Agreement by Owner of Hereditaments to pay rates whether Hereditaments occupied or not—Metropolis Local Management Act, 1855 (18 & 19 *Vict. c.* 120), *ss.* 6 *and* 54—*Poor Rate Assessment and Collection Act*, 1869 (32 & 33 *Vict. c.* 41), *s.* 3.

The Metropolis Local Management Act, 1855, *s.* 6, *provides that "the vestry elected under this Act in any parish shall consist of persons rated or assessed to the relief of the poor upon a rental of not less than* 40*l. per annum; and no person shall be capable of acting or being elected as one of such vestry for any parish unless he be the occupier of a house, lands, tenements, or hereditaments in such parish, and be rated or assessed as aforesaid upon such rental as aforesaid within such parish*":—Held, *that a person is not qualified under this section unless he is the occupier of a house, &c., the rental of which is not less than* 40*l.*

Semble, *in the expression "rated and assessed as aforesaid," the word "aforesaid" refers to the words "the occupier of a house, lands, tenements, and hereditaments in such parish."*

An agreement, under the Poor Rate Assessment and Collection Act, 1869, *s.* 3, *by the owner of hereditaments to pay the poor rates assessed in respect thereof, is not equivalent to the owner being rated himself.*

Action tried in Middlesex before Lopes, J., without a jury.

The action was brought by the plaintiff, as a common informer, under section 54 of the Metropolis Local Management Act, 1855, to recover two penalties of 50*l.* each from the defendant for having acted as a vestryman of the vestry of St. Leonard's, Shoreditch, without being qualified as required by section 6 of that Act.

The facts and arguments sufficiently appear from the judgment.

Bompas, Q.C., and *Bucknill*, for the plaintiff.

Winch, for the defendant.

Cur. adv. vult.

LOPES, J. (on April 18), delivered judgment as follows:—This action was brought by the plaintiff against the defendant to recover penalties because the defendant had on two occasions acted as a member of the vestry of Shoreditch without being qualified by rating and occupation as required by the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120). Section 6 of that Act fixes the qualification of vestrymen (1). They must

(1) The Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), s. 6, provides as follows:—"The vestry elected under this Act in any parish shall consist of persons rated or assessed to the relief of the poor upon a rental of not less than 40*l.* per annum, and no person shall be capable of acting or being elected as one of such vestry for any parish unless he be the occupier of a house, lands, tenements, or hereditaments in such parish, and be rated or assessed as aforesaid upon such rental as aforesaid within such parish: Provided always that

Mogg v. Clark.

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ndant occupied a garden which
jointly rated with a house let to
another man at 18*l.* The defendant occupied nothing else within the parish. He was the owner of several small tenements which were rented by tenants whose names appeared in the rate-book as occupiers. The defendant had agreed with the overseers, under section 3 of the Act 32 & 33 Vict. c. 41, to be liable for the poor rates assessed in respect of these tenements. The aggregate rental of these tenements was 68*l.*, and so appeared in the rate-book.

This case depends on the construction of section 6 of the 18 & 19 Vict. c. 120.

It was contended by the defendant that the occupation of any rateable property within the parish, however small its rateable value, was sufficient to satisfy the requirement as to occupation; and the defendant further contended that he was rated in the required amount because as owner he had agreed with the overseers to be liable for the poor rates assessed in respect of the aforesaid small tenements; in fact he contended that a liability to pay poor rates under an agreement with the overseers was equivalent to being himself rated.

It is material to consider the objects the Legislature had in view when it imposed the qualification contained in section 6 on vestrymen. I presume occupation in the parish was required because it was expedient that vestrymen should be on the spot and be conversant with the locality, and rateability to a certain amount, in order that they might substantially contribute towards and have a stake in the funds which they had to administer. It is also material to bear in mind that occupation of real property in the parish is necessary to render a person liable to be rated to the relief of the poor in that parish.

Bearing these matters in mind, I think the true construction of section 6 is that no person is to be qualified as a vestryman unless he is an occupier of real property in the parish and is rated or assessed in respect of such occupation in the specified amount. He must be the occupier of real property to the specified amount. Nobody was liable to be rated unless he was an occupier, and this may be the reason why the words "as such occupier" were not inserted, the Legislature regarding such words as surplusage. I am inclined, however, to think the first "as aforesaid" does refer to the words "occupier of a house, lands, tenements, and hereditaments," which almost immediately precede. But, whether this be so or not, I am clear that a person to be qualified must be rated or assessed to the required amount in respect of his occupation.

Even if my construction of section 6 is not correct, it seems impossible to contend successfully that the defendant was rated in the required amount. He could not be unless the agreement with the overseers to pay the rates for his tenants was equivalent to being rated himself. This cannot be. The persons rated were his tenants, the occupiers, and not the defendant.

in any parish in which the number of poor rate assessments at 40*l.* or upwards does not exceed one-sixth of the whole number of such assessments, it shall not be necessary, in order to qualify a person to be a vestryman, that the amount of rental upon which he is rated or assessed as aforesaid exceed 25*l.*: Provided also that the joint occupation of any such premises as aforesaid, and a joint rating in respect thereof, shall be sufficient to qualify each joint-occupier in case the amount of rental on which all such occupiers are jointly rated will, when divided by the number of occupiers, give for each such occupier a sum not less than the amount hereinbefore required."

Mogg v. *Clark.*

I am of opinion, therefore, that the defendant was not qualified.

There must be judgment for the plaintiff for two penalties—100*l.*, with costs.

Judgment for plaintiff, with costs.

Solicitors—Bramall & White, for plaintiff; F. R. Smith & Son, for defendants.

BANKRUPTCY. 1884. Nov. 10. } *In re* THOMAS; *ex parte* POPPLETON.

Company — Registration — Company projected by less than Twenty subsequently increasing to more than Twenty Members —Agreement after Registration to abide by Contracts made before Registration—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 4.

An association projected by less than twenty persons, but subsequently increasing in number, as soon as it consists of more than twenty persons comes within the prohibition in section 4 *of the Companies Act*, 1862.

And this is so, notwithstanding that the business of the association is carried on by a committee of less than twenty persons, as agents of the association.

Crowther *v.* Thorley (32 W. R. 330) *distinguished.*

Where such an association established for the purpose of making loans to the members is subsequently registered, it is competent for the several members to agree to treat the engagements entered into by the old association as binding on the new association; and the agreement of one member is a good consideration for the agreement of the others.

Appeal of the trustee from an order of the Huddersfield County Court admitting a proof made on behalf of the Star Inn Commercial and Building Society.

The Star Inn Commercial and Building Society was projected by a meeting of ten or eleven persons in January, 1881. This meeting was adjourned to February, 1881, at which ten or eleven persons were again present, by whom it was resolved that business should be commenced on the 2nd of March, 1881. On the 2nd of March, 1881, the first contributions to the society were payable, and a meeting was held on that day. There were then thirty-one members. Since the 2nd of March, 1881, the number of members was always more than twenty. The society was not registered as required by the Companies Act, 1862.

By the rules of the society it was provided that the officers of the society should consist of a president, vice-president, steward, secretary, and a committee of seven members; that the committee should conduct the business of the society, and should be empowered to make such by-laws and regulations for the conduct thereof as they might deem necessary; and that the president should act as treasurer and trustee, and in him should be vested all property and securities of the society.

On the 9th of September, 1881, the debtor, Thomas, borrowed 100*l.* from the society, for which he gave a promissory note and became a member of the society. The loan was repayable by monthly instalments of 1*l.* 8*s.* 4*d.*

In consequence of the decision of the Court of Appeal in *Shaw* v. *Benson* (1) on the 5th of June, 1883, it was decided to register the society, and the society was accordingly duly registered on the 25th of June, 1883, under the Companies Act, 1862.

The memorandum of association of the society set forth that—"The objects for which the society is established are: (*a*) To acquire and take over the business, assets, and liabilities of the existing society known as 'The Star Inn Commercial and Building Society' . . . .; to continue the business of the said society, and to collect and recover all or any portion of the debts due to the said society previous to the registration of these presents, &c."

Subsequently to the registration of the society the debtor made three payments, on the 4th of July, 3rd of October, and 3rd of December, 1884, on account of the loan.

(1) 52 Law J. Rep. Q.B. 575; Law Rep 11 Q.B. D. 563.

In re Thomas; ex parte Poppleton, Bankr.

The debtor filed his petition on the 20th of December, 1884, and the appellant was appointed trustee.

The society tendered a proof in the liquidation of Thomas for the amount remaining due upon the loan, which the trustee rejected. On appeal to the Yorkshire County Court at Huddersfield, the learned County Court Judge, being of opinion that the society was not illegal at the time the debt was contracted, as the society consisted of less than twenty members when formed, reversed the decision of the trustee and admitted the proof tendered on behalf of the society.

The trustee appealed.

Forbes, *Q.C.*, and *R. W. Harper*, for the trustee, submitted that, as the society was unregistered, and consequently illegal, at the date of the loan to the debtor, they could not recover the amount, and their proof must be rejected.

Mr. Samuel Learoyd, solicitor, for the Star Inn Commercial and Building Society. —First, the society originally consisted of less than twenty members, and could be registered at any subsequent time. The 4th section of the Companies Act, 1862, aimed only at societies of more than twenty members when originally formed; for the words "by subsequent admission," which are found in section 2 of the Joint Stock Companies Act, 1844 (7 & 8 Vict. c. 110), are purposely omitted from the present Act. Secondly, the business of the society was carried on by a committee of seven persons, and its property was vested in a single trustee. Thirdly, the debtor having made payments to the society after registration, has adopted or acquiesced in the arrangement whereby the society sought to cure its legal infirmity and make its illegal compact legal. He referred to *Crowther* v. *Thorley* (2), *Shaw* v. *Simmons* (3), *Smith* v. *Anderson* (4), *Cairncross* v. *Lorimer* (5), *Sharp* v. *Taylor* (6), *Scarfe* v. *Morgan* (7), and *In re The Mexican and South American Company; ex parte Aston* (8).

Forbes, *Q.C.*, in reply.—The original defect in the formation of the society cannot be remedied—*Chapman* v. *Black* (9).

CAVE, J.—The Star Inn Commercial and Building Society was originally formed by ten or eleven persons, who met together on a certain day in January, 1881, and who adjourned their meeting to the 2nd of February, 1881. They then fixed the 2nd of March, 1881, for the payment of contributions and for the commencement of business; and on the 2nd of March, 1881, more than twenty persons became members, and the association has consisted of more than twenty from that day to this. I am of opinion that this is clearly an association within the meaning of the 4th section of the Companies Act, 1862. I cannot assent to the doctrine that because a society is projected by eleven persons, and subsequently grows to more than twenty persons, it is outside the Act. This would be making a laughing-stock of the Act altogether. In my view the moment the number of members exceeded twenty it became illegal for them to carry on business without registration. Secondly, it is urged by Mr. Learoyd that although the members of the association numbered over twenty, yet the business was really carried on by the committee as trustees within the meaning of the decision in *Crowther* v. *Thorley* (2), and consequently it was not bound to be registered under the Act. The society was a money-lending society, and the committee carried on as its agents the business which the individual members could not have carried on. The committee did not carry on business as trustees like those in *Crowther* v. *Thorley* (2), but carried on business as agents and officers of the society. The main object of the society in *Crowther* v. *Thorley* (2) was to buy freehold land and divide it amongst the members, and in my opinion the judgment proceeds upon the fact that the trustees carried on business in their own names and were themselves responsible. In this case the committee did not carry on busi-

(2) 32 W. R. 330.
(3) 53 Law J. Rep. Q.B. 29; Law Rep. 12 Q.B. D. 117.
(4) 50 Law J. Rep. Chanc. 39; Law Rep. 15 Ch. D. 247.
(5) 7 Jur. N.S. 149.
(6) 2 Phill. 801.
(7) 4 Mee. & W. 270; 7 Law J. Rep. Exch. 324.
(8) 27 Beav. 474; 28 Law J. Rep. Chanc. 631.
(9) 2 B. & Ald. 588.

In re Thomas; ex parte Poppleton, Bankr.

ness in their own name; they were appointed according to the rules of the society; and although they may make by-laws, yet those by-laws are all of a subordinate character, and the rules themselves cannot be altered except by the society in general meeting. If I were to hold that the society did not require registration, I should be holding practically that every society numbering over twenty members, the business of which was being carried on by an agent, does not require registration. Then comes the third point. I have come to the conclusion, as I have already stated, that the business was being carried on by the society in an illegal manner, and that down to June, 1883, the debtor might have repudiated his obligation to the society, and could not have been compelled to pay the money due to the society; but on the 25th of June, 1883, a very important change took place. It was discovered that the members were unprotected because they were not registered, and thereupon they got themselves registered under the Act. It is sworn by Mr. Jessop (10) that the debtor had notice of the incorporation of the society, and that since the incorporation he had made three payments at different periods, and that he has recognised and adopted the incorporation. In my opinion the inference is that by express agreement or by acquiescence the parties did agree that they would become registered, and that they would treat all the engagements entered into by the old society as binding on the new society. It was competent for the several members to bind themselves to their old contracts, and the agreement of one was a good consideration for the agreement of the others. The society was registered, and I have no doubt whatever that the members continued to make their payments with notice of that registration. I have offered the trustee an adjournment, to give him an opportunity of shewing how it was that the debtor came to recognise and adopt the registration and to pay the monthly contributions. He has declined the offer, and I am clearly of opinion that upon the statements contained in the affidavit of Mr. Jessop, and in the absence of any explanation as to these statements from the debtor, the proper conclusion is that the debtor and the other members did agree that they would recognise and adopt the incorporation of the new society, and they would go on with the new society in the same way as before the registration.

(10) The trustee of the Star Inn Commercial and Building Society.

I am of opinion on these grounds that there was a good debt, and that the proof ought to have been admitted, but on different grounds from that taken by the County Court Judge; and I dismiss the appeal, with costs.

Appeal dismissed, with costs.

Solicitors—C. Fitch, agent for Milnes & Marshall, Huddersfield, for the trustee; Learoyd & James, agents for Learoyd & Piercy, Huddersfield, for the Star Inn Commercial and Building Society.

1885. March 23. } THE QUEEN *v.* THE MAYOR ETC. OF WIGAN.

Municipal Corporations—Town Councillor—Resignation of Office—Withdrawal of Resignation—45 & 46 *Vict. c.* 50. *s.* 36.

By section 36 *of the Municipal Corporations Act*, 1882, "*a person elected to a corporate office may at any time, by writing signed by him and delivered to the town clerk, resign the office on payment of the fine provided for non-acceptance thereof*," *and* "*in any such case the council shall forthwith declare the office to be vacant.*"

A. wrote to the town clerk resigning his office of town councillor, and enclosing the amount of the fine payable on resignation. At the next meeting of the town council the letter of resignation was read, but, on some members of the council desiring that A. should not resign, he consented to withdraw his resignation:—Held, *that it was not competent to the council to accept the withdrawal of A.'s resignation, but that they were bound by section* 36 *to declare the office vacant.*

Rule calling on the mayor, aldermen, and councillors of the borough of Wigan to shew cause why a writ of *mandamus*

should not issue directed to them, commanding them to declare and signify the office of Henry Ackerley as councillor for All Saints' ward in the said borough vacant by his resignation pursuant to the Municipal Corporations Act, 1882, s. 36 (1). The office of town clerk being about to become vacant, Mr. Ackerley, the town councillor, was desirous of being appointed, and it being necessary that he should cease to be a member of the council (section 17), he wrote on the 30th of January, 1885, to the town clerk as follows:—"Dear sir,—I beg to give you notice that I resign the office of councillor for No. 5 or All Saints' ward of the borough of Wigan. In accordance with the Municipal Corporations Act, 1882, I beg to hand you a cheque for 25*l.*, the amount of the fine on resignation."

This resignation was entered on the notice of the council meeting for the 4th of February, 1885, and a notice to attend that meeting was sent to Mr. Ackerley. He had not in the meantime in any way attempted to withdraw his resignation, nor had the cheque been cashed. At the meeting of the 4th of February the letter of resignation was read by the town clerk.

Some members of the council were anxious that Mr. Ackerley should not resign, and after some discussion Mr. Ackerley, who was present, said, "I am quite willing to withdraw my resignation, and I shall be glad if the council will allow me to do so." The matter was then allowed to stand over, and on the 6th of February Mr. Ackerley wrote to the town clerk formally withdrawing his resignation. Before the next meeting of the town council the opinion of counsel was taken as to whether it was competent to the council to allow Mr. Ackerley to withdraw his resignation. The opinion (2) was to the effect that it was not; but the council, notwithstanding, refused by a majority to act upon the advice and to declare the office vacant, whereupon the rule *nisi* for a *mandamus* was obtained and issued.

The Solicitor-General (*Sir F. Herschell*) (*Channell* with him) shewed cause.—It will be contended that, as soon as the letter was delivered to the town clerk, it was obligatory on the council to declare the office to be vacant under section 36 (1); but it was competent to Mr. Ackerley to withdraw the resignation before it was acted on, and both parties consented to this being done. The ordinary rule applies by which parties to an agreement are allowed to withdraw if nothing has been done to alter their respective positions. The words of the Act, "In any such case the council shall forthwith declare the office to be vacant," are no doubt peremptory, but. "such case" has not arisen.

R. S. Wright, in support.—There was nothing else to be done to complete resignation either by Ackerley or the town clerk, and the council had no alternative but forthwith to declare the office to be vacant. Formerly the resignation of a corporate office was not complete until acceptance, and it was to remedy this state of things that 6 & 7 Will. 4. c. 104. s. 8 was passed, by which the office might be resigned on payment of a fine. In *Staniland* v. *Hopkins* (3) the Court were of opinion that no formal resignation was necessary, and it was to get rid of doubts as to resignation that the Municipal Corporations Act of 1882 was passed. Acceptance is not now necessary to complete resignation, and section 36 is imperative in its language. The town council are "forthwith" to declare the office to be vacant.

The Solicitor-General, in reply.

MATHEW, J.—I am of opinion that this rule should be made absolute. The town council were wrong in resolving not to accept the resignation of Mr. Ackerley. All the provisions of section 36 (1) necessary for a valid resignation appear to have been fulfilled by him, the resignation was complete, and the next step, as indicated by the succeeding paragraph, was for the council "forthwith" to declare the office

(1) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 36: "(1) A person elected to a corporate office may at any time, by writing signed by him and delivered to the town clerk, resign the office, on payment of the fine provided for non-acceptance thereof. (2) In any such case the council shall forthwith declare the office to be vacant. . . . ."

(2) The case was submitted to Mr. R. S. Wright.

(3) 9 Mee. & W. 178; 11 Law J. Rep. Exch. 65.

The Queen v. *Mayor &c. of Wigan.*

vacant. The Solicitor-General has contended that these proceedings are to be subject to the ordinary rule by which parties to an agreement can withdraw before either side has acted; but the terms of the Act are too plain and peremptory for such a contention to prevail. The council had no alternative but to peclare the office vacant.

SMITH, J.—I am of the same opinion. Section 36 has evidently been passed to remedy the inconveniences caused by the earlier statute of 6 & 7 Will. 4. c. 104. s. 38, and has provided the means to be employed by the person wishing to resign; when he has complied with those provisions he has resigned.

Mr. Ackerley intended to resign, and appears to have been of the same mind until the meeting of the 4th of February, when, on some one moving that his resignation be not accepted, he expressed himself as willing to withdraw his resignation. There was no power, then, to withdraw, because the council were bound to declare the office vacant.

Rule absolute.

Solicitors—Burn & Berridge, agents for J. Wilson, Wigan, for applicant; Sharpe, Parkers & Co., agents for M. Peace, Wigan, for the Corporation of Wigan.

[IN THE COURT OF APPEAL.]

1885. May 1. HERMANN *v.* JEUCHNER.*

Contract—Illegality—Money paid for Illegal Object—Completion of the Object—Deposit by Convicted Person to secure Surety for good behaviour.

Where a person is upon conviction of a criminal offence required to find a surety for his good behaviour, and by agreement with his surety deposits money with him, he cannot afterwards recover it.

The illegal object is sufficiently complete when the deposit has been made and the security executed, and the principal cannot by repudiating the transaction before the security is forfeited and the money applied as an indemnity recover the money.

* *Coram* Brett, M.R., Baggallay, L.J., and Bowen, L.J.

The deposit of money by a person required to find a surety for his good behaviour to secure his surety is contrary to public policy, and no legal contract arises out of it.

Wilson *v.* Strugnell (50 Law J. Rep. M.C. 145; Law Rep. 7 Q.B. D. 548) *overruled.*

Appeal of the defendant from the judgment of Stephen, J., at the trial in Middlesex without a jury, in an action brought to recover 49*l.* money had and received to the plaintiff's use.

In April, 1883, the plaintiff was convicted of keeping a disorderly house, and was required to find a surety for his good behaviour in 50*l.* for two years. The plaintiff applied to the defendant to be surety for him. The defendant stipulated that 50*l.* should be deposited with him, to be returned at the end of the two years if the security was not forfeited. The plaintiff deposited 49*l.* with the defendant, who thereupon became his surety. Before the two years had expired the action was brought.

Stephen, J., gave judgment for the plaintiff, following his own decision in *Wilson* v. *Strugnell* (1), and being of opinion that although the plaintiff could not have recovered if the security had been forfeited and the defendant had been called on to pay the penalty, yet, as the illegal contract had not been fully performed, the plaintiff was entitled to recover his money.

Cock, for the defendant.—First, if the contract was illegal it was sufficiently executed by the payment of the money to the defendant. *Wilson* v. *Strugnell* (1) was wrongly decided, and the case comes within the principle of *Taylor* v. *Chester* (2). *Bone* v. *Ekless* (3) was the case of a principal recovering from an agent before the illegal purpose was carried out, and *Taylor* v. *Bowers* (4) was a similar case.

(1) 50 Law J. Rep. M.C. 145; Law Rep. 7 Q.B. D. 548.

(2) 38 Law J. Rep. Q.B. 225; Law Rep. 4 Q.B. 309.

(3) 5 Hurl. & N. 925; 29 Law J. Rep. Exch. 438.

(4) 46 Law J. Rep. Q.B. 39; Law Rep. 1 Q.B. D. 291.

Hermann v. *Jeuchner, App.*

[BOWEN, L.J., referred to *Simpson* v. *Bloss* (5).]

Secondly, the contract was legal, and the defendant is entitled to retain the money until the two years have expired. In *Cripps* v. *Hartnoll* (6) a similar contract was enforced.

[BRETT, M.R.—In that case the person indemnifying was not the person bound to find the security. In *Jones* v. *Orchard* (7) Jervis, C.J., said, "I should be inclined to think that it would be contrary to public policy to imply a contract between an offender and his surety to indemnify the surety in the case of the principal's non-appearance, because the effect of that would be to give the security of one person only instead of the number required by law to insure the appearance of the offender."]

S. Boulter, for the plaintiff, relied on the reasoning in *Wilson* v. *Strugnell* (1).

BRETT, M.R.—This is an action on a contract between the plaintiff and the defendant. What is necessary to make a contract binding if it is not under seal? There must be consideration and promise. If the contract or an indivisible part of it is illegal, the contract cannot be enforced. The 49*l.* was to remain for two years upon deposit if the defendant would enter into the bail bond. Is either one of those things illegal? Is it illegal to become surety in a criminal proceeding in consideration of taking 49*l.*? It is, because it takes away from the law and the authority of the law what was intended to be given to it. The reason why the law requires sureties is because it is to the interest of the sureties to see that the principal does what is required. If they are secured by a deposit, they have no interest whatever, and the law is without the protection which was intended. The plaintiff sues before the expiration of the two years to recover back the money. If the transaction was legal, the plaintiff brought his action too soon. But the plaintiff can only support his action by saying, "I can recover, because I paid the money on a contract which was illegal, but that contract has not been carried out." The defendant says that the plaintiff cannot recover because the whole contract on both sides is fulfilled. The 49*l.* has been paid, and the security has been entered into. If the contract was completed it follows that the plaintiff cannot recover. We differ from the learned Judge in respect of his thinking that the contract was not wholly concluded. We think it was. He seems to have thought that it was not concluded because the money was not paid under the bail bond. In our opinion that is not the test, as the defendant by his agreement with the plaintiff did not undertake to pay under the bail bond. I think the plaintiff can no more recover after the two years than now. In regard to the case of *Wilson* v. *Strugnell* (1) I do not agree with it. It is the same case as this.

BAGGALLAY, L.J.—In my opinion the parties to this action are *in pari delicto*. In *Taylor* v. *Chester* (2) Mr. Justice Mellor says, "the plaintiff no doubt was the owner of the note, but he pledged it by way of security for the price of meat and drink provided for and money advanced to him by the defendant. In order to get rid of the defence arising on the plea the plaintiff had recourse to the special replication in which he was obliged to set forth the immoral and illegal character of the contract upon which the note had been deposited." Applying that rule to this case, I think the defendant is entitled to judgment. I do not express dissent from the principle of law laid down in *Wilson* v. *Strugnell* (1), but I think that Mr. Justice Stephen was wrong in holding that the illegal purpose had not been executed.

BOWEN, L.J.—I am of the same opinion. I think the contract was so far carried out that the plaintiff cannot regain the money paid by him.

Appeal allowed.

Solicitors—E. D. Lewis, for plaintiff; Freeman & Winthrop, for defendant.

(5) 7 Taunt. 246.
(6) 32 Law J. Rep. Q.B. 381.
(7) 16 Com. B. Rep. 614; 24 Law J. Rep. C.P. 229.

BANKRUPTCY. 1885. March 11. } *In re* GILLESPIE AND COMPANY; *ex parte* REID AND SON.

Bankruptcy—Mutual Dealings—Set-off—Dealing after act of bankruptcy—Bill of Exchange—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 38.

Where a creditor of a debtor, after the debtor's bankruptcy and with knowledge thereof, accepts a bill of exchange, of which the debtor is holder, the creditor cannot set off the debt due to him before the bankruptcy against the claim of the trustee upon the bill of exchange.

In re The Milan Tramways Company; *ex parte* Theys (53 Law J. Rep. Chanc. 1008; Law Rep. 25 Ch. D. 587) *followed.*

Elliott *v.* Turquand (51 Law J. Rep. P.C. 1; Law Rep. 7 App. Cas. 79) *distinguished.*

On the 9th of April, 1884, a receiving order of the debtor's estate was made, and the now trustee was appointed manager of the business. At that date the debtors were indebted to Reid & Son to the extent of 138*l.* 6*s.* 6*d.* on an account current between them.

On the 12th of April, 1884, a firm of Lamothe & Cassar, being indebted to the debtors, forwarded to them a bill of exchange for 100*l.*, dated the 24th of March, 1884, and falling due the 14th of July, 1884. This bill of exchange was drawn by one D. P. Adam upon Reid & Son, and was indorsed by Lamothe & Cassar.

Credit was given to Lamothe & Cassar in the books of the debtors for this bill.

On the 19th of April, 1884, Reid & Son, to prevent the trustee of the debtors' estate from proceeding against the drawer, who was resident in the West Indies, accepted the bill, and subsequently, on the 16th of July, paid the amount thereof to the trustee, under protest, contending that they had a right to set off an aliquot part of the debt of 138*l.* 6*s.* 6*d.* against the claim of the trustee on the bill.

Reid & Son now applied for an order upon the trustee to refund to them the sum of 100*l.*, being the amount of the bill of exchange.

Pyke, for Reid & Son, cited *Elliott* v. *Turquand* (1).

Yate Lee, for the trustee.—After the commencement of the bankruptcy there can no longer be mutual dealings between the debtor and a creditor; the trustee does not represent the debtor to accept or create liability—*Alloway* v. *Le Steere* (2) and *Ex parte Dyke; in re Morrish* (3). At the time of acceptance the bill of exchange was the trustee's, whose title relates back to the petition—Bankruptcy Act, 1883, s. 43. The case of *Elliott* v. *Turquand* (1) is distinguishable, on the ground that the act of bankruptcy was unknown to the creditor at the time of the dealing after bankruptcy. He also referred to *Dickson* v. *Cass* (4) and *In re The Milan Tramways Company; ex parte Theys* (5).

Pyke, in reply.—Set-off in bankruptcy is allowed for the purpose of doing justice, not to prevent cross-actions.

[CAVE, J.—Reid & Son were not bound to accept this bill of exchange; if they had not accepted it, the estate of the debtor would have got the amount of it elsewhere.]

CAVE, J. [having stated that he found the facts to be as above set out, proceeded:] Now the next contention is, that the bill of exchange in question having been accepted on the 19th of April, Reid & Son are entitled to set off an aliquot proportion of the debt due to them from the estate of the debtor. That depends upon section 38 of the Act. The important point to ascertain is down to what time mutual credits or dealings can go on. The general proposition is contained in the case of *In re The Milan Tramways Company; ex parte Theys* (5). In the language of the Lord Chancellor (Earl of Selborne), "the line is drawn at the time of the bankruptcy, and the rights of the parties are not to be altered by subsequent transactions." Mr. Pyke says that section 38

(1) 51 Law J. Rep. P.C. 1; Law Rep. 7 App. Cas. 79.
(2) 52 Law J. Rep. Q.B. 38; Law Rep. 10 Q.B. D. 22.
(3) 52 Law J. Rep. Chanc. 570; Law Rep. 22 Ch. D. 410.
(4) 1 B. & Ad. 343.
(5) 53 Law J. Rep. Chanc. 1008; Law Rep. 25 Ch. D. 587.

In re Gillespie; ex parte Reid, Bankr.

does not say where mutual credits stop, and that *Elliott* v. *Turquand* (1) shews that the line cannot be drawn at bankruptcy itself. That case is an authority for that proposition; but in that case there had been a secret act of bankruptcy, and all the considerations which justify the decision fall short of justifying me in finding in Reid & Son's favour here. To do so upon this application would be to go a step, and a very serious step, further than *Elliott* v. *Turquand* (1). The Court in that case carefully abstained from saying that mutual dealings would continue after a known act of bankruptcy. It is impossible to get over the statement of the law in *In re The Milan Tramways Company; ex parte Theys* (5). The only modification of the principle there laid down is, that where the act of bankruptcy is secret, the time when mutual dealings end is the time when the act of bankruptcy is known. There is no authority to justify me in carrying the exception a step further. I am of opinion that the present case falls within the general doctrine, and not within the exception.

Motion refused, with costs.

Solicitors—Irvine & Hodges, for Reid & Son; Druces, Jackson & Attlee, for trustee.

1884. Dec. 10.

In re AN ARBITRATION BETWEEN WADHAM AND OTHERS AND THE NORTH-EASTERN RAILWAY COMPANY.

Lands Clauses Act, 1845—*Compensation for house "injuriously affected"—Special Value as a Public-house.*

A railway company having in the exercise of the powers of their Act incorporating the Lands Clauses Act, 1845, *stopped up a street in which was a house used as a hotel, the question of compensation was submitted to arbitration. The arbitrator found that the house, apart from its special value as a hotel and public-house, had been injuriously affected by the works of the company, and he assessed the compensation at the sum of* 650*l. He further stated by way of Special Case that the value of the house for using, selling, and letting as a hotel and public-house had been diminished to the extent of* 900*l., and that if this depreciation in its special value was taken into account the sum to be awarded as compensation should be assessed at* 1,550*l. instead of* 650*l.*:—Held, *that the owner was entitled to compensation under the Lands Clauses Act*, 1845, *for the depreciation in the special value of the premises as a hotel and public-house, and that he was therefore entitled to the larger sum.*

Special Case stated by an arbitrator under the Lands Clauses Consolidation Act, 1845. The claimants were owners in fee of houses, land, and premises known as the Royal Hotel, situated on a highway in the county of Durham known as Hudson Street. This highway had been altered and stopped by the company in exercise of the powers of their Act incorporating the Lands Clauses Act, 1845, and in consequence the hotel had been injuriously affected; and in order to settle what amount of compensation should be paid by the company, the matter was submitted to an arbitrator under the provisions of the Lands Clauses Act, 1845. The arbitrator by his award found that the hotel and premises had been injuriously affected by reason of the execution of the works by the company, and he assessed the compensation at the sum of 650*l.*, and by

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1885. Feb. 26.

THE WEST MIDDLESEX WATERWORKS COMPANY *v.* COLEMAN. COLEMAN *v.* THE WEST MIDDLESEX WATERWORKS COMPANY.

Waterworks Company—Premises occupied as a Public-house—Lease—Premium and Rent — Licence — Mode of fixing "Annual Value"—Statutes 10 *&* 11 *Vict. c.* 17. *s.* 68, *and* 15 *&* 16 *Vict. c.* clix. *s.* 31.

[For the report of the above case, see 54 Law J. Rep. M.C. 70.]

In re Wadham.

way of Special Case for the opinion of the Court the arbitrator stated as follows :—

"I hereby state and find as facts that the said house and premises known as the Royal Hotel have by reason of the execution by the said company of the said works authorised by the said Act been rendered less suitable for the purposes of being used as a hotel and public-house, and by reason thereof the value of the said Royal Hotel for using, selling, or letting as a hotel and public-house has been diminished. I have not in my award allowed for any sum as compensation for the depreciation in the special value of the said Royal Hotel as a hotel and public-house, and I hereby submit to the opinion of the Court whether or not I ought to have allowed for any sum in respect of the depreciation in the special value in this paragraph mentioned.

"If the Court be of opinion that I ought to have allowed for and included in my said award a sum as compensation for the depreciation in the special value of the Royal Hotel as a hotel and public-house, then I hereby assess, award, and determine such sum to be the further sum of 900*l.*; and in such event I assess, award, and determine the amount of compensation to be paid by the said North-Eastern Railway Company in respect of the injurious affecting of the said houses, lands, and premises situate at Hudson Street aforesaid and known as the Royal Hotel, and the said dwelling-house and shop adjoining thereto, and the lands and hereditaments held and enjoyed therewith, by reason of the execution of the said works by the said company, at the sum of 1,550*l.*, in lieu of and substitution for the said sum of 650*l.*, and not in addition thereto."

A. Charles, Q.C. (*Cock* with him), for the claimants.—The claimants are entitled to receive compensation for the premises in their then condition—that is, as for a licensed hotel, and not merely as an ordinary house.

The Court called on

Sir Farrer Herschell (*Solicitor-General*) (*Meysey Thompson* with him), for the railway company.—The damage for which compensation may be assessed, is the injury done to the estate, and not the particular use to which it may from time to time be put—*The Metropolitan Board of Works* v. *McCarthy* (1) and *Beckett* v. *The Midland Railway Company* (2)—and the arbitrator rightly followed those cases and the decision of the House of Lords in *Ricket* v. *The Metropolitan Railway Company* (3). The injury caused by obstruction of the access can be the subject of compensation, but the hotel must be treated as an ordinary house put to an ordinary use—*The Caledonian Railway Company* v. *Walker's Trustees* (4). The licence only gives a temporary value to the house which may be taken away at any moment. The particular trade is an unsound basis, because it may fail to-morrow, while the compensation is to be assessed for all time, and must be for damage or injury to the premises of the claimant considered independently of any particular trade he may have carried on there. See *per* Lord Penzance in *The Metropolitan Board of Works* v. *McCarthy* (1).

A. Charles, Q.C. — If the "land injuriously affected" is merely land, compensation must be given for it as land; but compensation must be given for it, if houses, as houses; if shops, as shops; if a public-house, as a public-house—*Chamberlain* v. *The West End Railway Company* (5). In *The Caledonian Railway Company* v. *Walker's Trustees* (4) Lord Selborne, L.C., points out that the loss of custom was the only ground on which a claim for compensation was made; in the present case an injury to the premises is expressly stated.

Sir F. Herschell replied.

MATHEW, J.—I am of opinion that the claimant is entitled to the larger sum mentioned by the arbitrator. I construe the finding of the arbitrator to mean that for the purpose of being sold in the market the hotel is less valuable by reason of what the company have done. The arbitrator

(1) 43 Law J. Rep. C.P. 385; Law Rep. 7 E. & I. App. 243.
(2) 37 Law J. Rep. C.P. 11; Law Rep. 3 C.P. 82.
(3) 36 Law J. Rep. Q.B. 205; Law Rep. 2 E. & I. App. 175.
(4) Law Rep. 7 App. Cas. 259 (Scotch).
(5) 2 B. & S. 617; 31 Law J. Rep. Q.B. 201.

In re Wadham.

does not find that 900*l.* represents any depreciation in the trade carried on by the particular tenant, nor that the depreciation in value is due to any interference with the access to the house, but he finds that the depreciation to the value of the property, apart from the purpose for which it is used, is 650*l.*, and that 900*l.* is the further sum representing the depreciation in the special value of the hotel. The Solicitor-General has called our attention to different cases in which the mode of assessing compensation is laid down, and, looking at the precise language of the learned Judges who delivered judgment in those cases, there is no doubt foundation for the argument of the railway company; but I do not understand those learned Judges to lay down any more than this—namely, that you are not in calculating the damage for injuriously affecting the premises to take into account any special or exceptional value which the premises may have in the hands of the then proprietor. It appears to me that we are bound in this case to award the larger sum that has been found by the arbitrator, because I construe his award to be that if the property were put upon the market to-morrow it would be worth 900*l.* less than it was before the railway company caused the obstruction of which the claimants complain. Our judgment therefore must be for the claimants.

DAY, J., concurred.

Judgment for the claimants.

Solicitors—Iliffes, Healey & Sweet, agents for Mabane & Grahame, South Shields, for claimants; Williamson, Hill & Co., agents for G. S. Gibb, for railway company.

1885. March 28. } JONES *v.* THE MAYOR ETC. OF LIVERPOOL.

Negligence — Master and Servant — Water-cart of a Corporation used with hired horse and driver.

Where the defendants, a municipal corporation, hired a horse and driver to draw a water-cart of the corporation and water the streets, the driver being directed by their inspector when and where and what streets to water, but not being otherwise under the control or superintendence of the defendants, and an injury was done to a third party by the negligence of such driver while engaged in watering a street, it was held, *within the principle of* Quarman v. Burnett (6 Mee. & W. 499; 9 Law J. Rep. Exch. 308), *that the defendants were not liable to be sued for such injury.*

This was an action to recover damages for injuries occasioned to the plaintiff's carriage, by reason, as it was alleged, of the negligence of the defendants or their servant in negligently driving a cart and horse in the course of watering the streets of Liverpool on the 23rd of May. The defendants denied the negligence and that the driver was their servant.

The facts relative to the employment of the driver of the water-cart, as appearing in the defendants' answers to interrogatories, and taken to be correct, were as follows:—

"The driver of the horse and cart mentioned in the statement of claim was Frederick Dean, of 9 Wilfer Street, Liverpool, carter. He was then in charge of the said cart and horse which the defendants were using, as and under the circumstances hereinafter mentioned, for the purpose of watering Mount Pleasant on the said afternoon. The cart was the property of the defendants; the said horse was the property of Margaret Dean.

"The said driver was not in the employment of or paid by the defendants. He was, at the time of the accident, in the employment of and paid by the said Margaret Dean. The said driver was under the control, authority, and direction of the defendants to the following extent, and not otherwise. He was directed by the inspector of the defendants to water

certain streets, or certain portions of streets, from time to time; and under the contract with the said Margaret Dean hereinafter mentioned, the defendants were entitled to require him to obey such directions. The defendants, on the said 23rd of May, hired from the said Margaret Dean, for the day, a horse and driver to draw and drive a watering cart, on the terms that they should pay her 9*s.* for the use of such horse and driver; and the said Margaret Dean sent the said driver and the said horse for the purpose and on the terms aforesaid. The said contract of hiring was made verbally.

"The defendants employ inspectors to superintend the watering of their streets, and it is part of the duty of such inspectors to direct the drivers of the watering carts when and where to water the streets, and, so far as is necessary for this purpose and not otherwise, the said inspectors have authority and control over the said drivers and carts. There was no such inspector at or near the place where the said accident took place at the time of the said accident. There was no inspector then and there superintending or controlling the said driver. The said driver was under the general direction and control of the inspector of the defendants as hereinbefore mentioned and not otherwise.

"The inspector came up a quarter of an hour after the accident, and made inquiries as to the accident."

On the trial before Day, J., at the Liverpool assizes, the jury found negligence in the driver, and gave a verdict for 28*l.* damages.

Upon this, Day, J., after taking time to consider, gave judgment in the following terms:—"The true principle on which the liability is to be determined depends on what was the true nature of the service that existed. It seems to me that in this case the man driving a horse owned by another person, and working it in a cart the property of the corporation for the purpose of doing the work of the corporation, must be deemed while doing that work to be the servant of the corporation. He seems to me to have been acting directly under the orders of the corporation, under the superintendence of their officers or inspector who had the supervision of this watering work; and therefore it seems to me that the corporation is liable for the negligence of which the driver was found guilty while doing that work."

The defendants now moved to set aside the judgment so given, on the ground that there was no evidence of negligence in any person for whom the defendants were responsible.

R. S. Wright, and *Austin*, for the defendants, relied on *Laugher* v. *Pointer* (1), as followed in *Quarman* v. *Burnett* (2), and cited also *Hughes* v. *Percival* (3) and *Reedie* v. *The London and North Western Railway Company* (4).

Aspland and *Synnott*, for the plaintiff, cited *McLaughlin* v. *Pryor* (5), *Rourke* v. *The Whitemoss Colliery Company* (6), *Purnell* v. *The Great Western Railway Company* (7), *Murray* v. *Currie* (8), and *King* v. *Spurr* (9).

GROVE, J.—I think that this case has really been decided in *Quarman* v. *Burnett* (2) and *Laugher* v. *Pointer* (1). In the latter of those two cases the Judges were unanimous, and they upheld the opinion of Mr. Justice Littledale and Chief Justice Abbott in the earlier one where the Court was divided.

In the present case the facts are simple enough: the injury to the plaintiff's carriage was occasioned by the negligence of the driver of a water-cart which belonged to the defendants; the horse, however, and driver belonged to Mrs. Dean, and were hired by the defendants from her. It is therefore extremely like *Quarman* v. *Burnett* (2) in respect of the facts. Now, as the cart itself could do no injury *per se*, and there was, if I may

(1) 5 B. & C. 547.
(2) 6 Mee. & W. 499; 9 Law J. Rep. Exch. 308.
(3) 52 Law J. Rep. Q.B. 719; Law Rep. 8 App. Cas. 443.
(4) 4 Exch. Rep. 244.
(5) 4 Man. & G. 84; 11 Law J. Rep. C.P. 160.
(6) 46 Law J. Rep. C.P. 283; Law Rep. 2 C.P. D. 205.
(7) 34 Law Times, 126.
(8) 40 Law J. Rep. C.P. 26; Law Rep. 6 C.P. 24.
(9) 51 Law J. Rep. Q.B. 105; Law Rep. 8 Q.B. D. 104.

use the expression, no negligence in the cart itself, the negligence as alleged and found must be that of the driver. The distinction suggested, arising from the fact that an inspector of the defendants directed the driver what streets to water, is only apparent, not real, for the fact does not make the inspector the person who committed an act of negligence. If he had been sitting on the cart and directing it at the time of the accident, it might be different; but as the facts are, *Quarman* v. *Burnett* (2) seems precisely in point.

Mr. Aspland has called attention to the cases where a man has lent another his servant, as shewing that the person borrowing and using the servant becomes responsible for his acts and negligence.

Now, it appears to me that there is an obvious distinction—I do not know if it is a sound one in point of law—between the case where a jobmaster, say, selects a servant, and is paid for so doing when he lets out the man and carriage together; and the case where a person, without reward, lends another his servant.

I am content, however, to base my decision on the cases immediately in point, as the person whose negligence caused this accident was not the servant of the defendants, but of Mrs. Dean; and I think that the corporation are not liable.

MANISTY, J.—I also am of opinion that there was no evidence of negligence in the defendants in this case. The facts are to be found in the answers to interrogatories, from which it appears that the defendants, having to water the streets, and owning carts, but having no horses nor drivers, hired the latter from Mrs. Dean.

The inspector's duty was to superintend the watering and direct the drivers when and where to water the streets, and so far and not otherwise to order the drivers.

On these facts the question arises whether the driver was the servant of the corporation or not. I quite agree that *Quarman* v. *Burnett* (2) is in point, and I cannot distinguish it from the present case. Against this it is said that *Rourke* v. *The Whitemoss Colliery Company* (6), in the Court of Appeal, decides that when a servant of one person is under the control and acting as the servant of another, the latter, not the former, is liable for such servant's negligence. That was a case of lending an engine and engineer, and stands, I think, on a totally different footing from this hiring and paying for a man and horse, which man never became the servant or under the real control of the corporation.

Judgment for defendants.

Solicitors — Worthington Evans, agents for Jones, Paterson & Co., Liverpool, for plaintiff; F. Venn & Co., agents for G. J. Atkinson, Town Clerk, Liverpool, for defendants.

1885. Jan. 30. } SEYMOUR AND OTHERS *v.* BRIDGE.

Principal and Agent — Stockbroker — Purchase of Bank Shares — Omission to specify Numbers — Void Contract — Payment by Stockbroker on foot of Void Contract under pressure of Rules and Regulations of Stock Exchange — Leeman's Act (30 & 31 *Vict. c.* 29), *s.* 1.

The plaintiffs, who were stockbrokers and members of the London Stock Exchange, having, at the request of the defendant, purchased upon the Stock Exchange certain bank shares, which the defendant afterwards refused to accept and pay for, on the ground that there was no valid contract of sale of the shares by reason of the provisions of Leeman's Act (30 & 31 *Vict. c.* 29), *were obliged, in accordance with the rules and regulations of the Stock Exchange, and to avoid expulsion from the Stock Exchange, to complete the purchase of and pay for the bank shares*:—Held, *that the plaintiffs, having been employed to act for the defendant according to the specific rules and regulations of the Stock Exchange, were entitled to recover from the defendant the price of the bank shares, together with commission, &c., as for money paid and work done by them for the defendant.*

Read *v.* Anderson (53 Law J. Rep. Q.B. 532; Law Rep. 13 Q.B. D. 779) *followed.*

Action tried in Middlesex before Mathew, J., without a jury.

The plaintiffs' claim was for 321*l.* 7*s.* 6*d.*

for money paid and work done by them for the defendant as stockbrokers, and for commission.

On the 30th of April, 1884, the defendant wrote to the plaintiffs, who were members of the London Stock Exchange, and requested them to purchase for him fifty Oriental Bank shares. The plaintiffs accordingly purchased the required shares from a jobber on the Stock Exchange for the next account-day on the 15th of May, 1884. This purchase was, as is usual on the Stock Exchange, verbal.

The plaintiffs thereupon forwarded to the defendant an advice or bought-note as follows:—

"23 Throgmorton Street, London, E.C.
April 30, 1884.

"Bought for C. Bridge, Esq.

Subject to the specific rules and regulations of the Stock Exchange

	£	s.	d.
15 Oriental Bank Corporation shares at 6¼	93	5	0
35 ditto at 6⅜	223	2	6
Stamps and fees	1	17	6
Commission	3	2	6
	£321	7	6

"Of White.

"For May 15.

"Seymour, Elwyn & Co."

The Oriental Bank stopped payment on the 2nd of May, 1884. On the same day the defendant called upon the plaintiffs, but he did not repudiate the transaction.

On the 6th of May, 1884, the defendant, having read an article in the *Standard* newspaper on the subject, wrote to the plaintiffs that as the contract-note forwarded to him did not contain the distinctive numbers of the shares, he was advised that the same was invalid, and declined to complete. The defendant by letter confirmed this repudiation on the 8th of May, 1884.

On the 9th of May, 1884, the plaintiffs wrote to the defendant refusing to accept his repudiation of the transaction, and forwarded him the numbers of the shares.

On the 14th of May, 1884, the "name-day," the plaintiffs passed the name of the defendant as the purchaser of the shares, and on the 17th of May, 1884, the plaintiffs paid the price of the shares.

The plaintiffs forwarded the transfers of the shares to the defendant in due course on the 21st of May, 1884, but he refused to accept them. On the same day, however, the defendant completed through the plaintiffs a purchase of certain shares in the London and San Francisco Bank, which transaction had been carried out in the same manner as the transaction in reference to the shares the subject of this action.

It was proved that the defendant had from time to time previously completed various transactions in bank shares with the plaintiffs, about 160 of such shares being Oriental Bank shares. In all these cases, the notes sent to the defendant did not contain the numbers of the shares.

It was proved that the transactions upon the Stock Exchange in bank shares are always carried out in the form in which the transaction in question in this action was effected, without any reference to numbers, and that Leeman's Act (30 & 31 Vict. c. 29) (1) is in fact disregarded on the London Stock Exchange. But the

(1) Section 1 of this statute enacts "that all contracts, agreements, and tokens of sale and purchase which shall from and after the 1st day of July, 1867, be made or entered into for the sale or transfer, or purporting to be for the sale or transfer, of any share or shares or of any stock or other interest in any joint stock banking company in the United Kingdom of Great Britain and Ireland, constituted under or regulated by the provisions of any Act of Parliament, royal charter, or letters patent, issuing shares or stock transferable by any deed or written instrument, shall be null and void to all intents and purposes whatsoever, unless such contract, agreement, or other token shall set forth and designate in writing such shares, stock, or interest by the respective numbers by which the same are distinguished at the making of such contract, agreement, or token on the register or books of such banking company as aforesaid; or where there is no such register of shares or stock by distinguishing numbers, then, unless such contract, agreement, or other token shall set forth the person or persons in whose name or names such shares, stock, or interest shall at the time of making such contract stand as the registered proprietor thereof in the books of such banking company; and every person, whether principal, broker, or agent, who shall wilfully insert in any such contract, agreement, or other token any false entry of such numbers, or any name or names other than that of the person or persons in whose name such shares, stock, or interest shall stand as aforesaid, shall be guilty of a misdemeanour, and be punished accordingly, and if in Scotland shall be guilty of an offence punishable by fine or imprisonment."

admission of this evidence was objected to on behalf of the defendant on the ground that the custom sought to be established is illegal.

The Rules and Regulations of the Stock Exchange provide as follows:—

Rule 52: "The Stock Exchange does not recognise in its dealings any other parties than its own members: every bargain, therefore, whether for account of the member effecting it or for account of a principal, must be fulfilled according to the rules, regulations, and usages of the Stock Exchange."

Rule 58: "No application which has for its object to annul any bargain in the Stock Exchange shall be entertained by the Committee, unless upon a specific allegation of fraud or wilful misrepresentation."

Rule 144: "A member unable to fulfil his engagements shall be publicly declared a defaulter by direction of the chairman, deputy-chairman, or any two members of the Committee."

Rule 145: "A member declared a defaulter in the Stock Exchange .... ceases to be a member."

The defendant in his evidence swore that he did not know that the plaintiffs would be liable to pay for the shares purchased by them if he did not pay, and that he had never made any enquiry upon the subject.

The further facts, so far as important, appear from the judgment.

Finlay, Q.C. (*Horne Payne* with him), for the plaintiffs, relied upon *Read* v. *Anderson* (2) and *Barclay* v. *Pearce* (3). They distinguished *Neilson* v. *James* (4) on the grounds, that—first, that case was an action against a broker for negligence, and not, as here, an action by a broker; secondly, in that case it was not alleged, as here, that the principal knew of the custom to disregard Leeman's Act. They also referred to *Tomkins* v. *Saffery* (5).

(2) 53 Law J. Rep. Q.B. 532; Law Rep. 13 Q.B. D. 779.

(3) Not reported. See the account of the case in the judgment of Grove, J., in *Perry* v. *Barnett*, *post*, at p. 354.

(4) 51 Law J. Rep. Q.B. 369; Law Rep. 9 Q.B. D. 546.

(5) 47 Law J. Rep. Bankr. 11; Law Rep. 3 App. Cas. 213.

Lumley Smith, Q.C. (*McCall* with him), for the defendant.—The custom of the Stock Exchange to disregard Leeman's Act (1) is illegal. In this case the plaintiffs could have made a binding contract, but not so in *Read* v. *Anderson* (2).

Finlay, Q.C., in reply.—The custom is not illegal. The statute does not declare the contract illegal, it only renders the contract not enforceable at law.

MATHEW, J.—I think my judgment in this case must be for the plaintiffs. I think the case concluded practically by the decision in *Read* v. *Anderson* (2).

Now, the plaintiffs in this case were employed as stockbrokers by the defendant, who had been a customer on many previous occasions, and they were employed, as appears abundantly from the previous transactions, to act on his behalf according to the specific rules and regulations of the Stock Exchange. Now, that employment imposed upon the plaintiffs the liability of principals as regards the jobbers with whom they dealt. The defendant professed to be ignorant of this liability—and it may be he did not trouble his head about the matter; but if he had chosen to enquire, he would have ascertained it.

The transaction in question was a transaction in Oriental Bank shares, and the plaintiffs were employed by the defendant to purchase a certain number of these shares for him shortly before the stoppage of the bank. They went in the ordinary course and made a verbal bargain with a jobber. The contract made in accordance with the usage was immediately afterwards forwarded by the plaintiffs to the defendant. Neither in the bargain between the brokers nor in the contract was there any reference to numbers. It is said that the absence of the reference to numbers discharged the defendant from all liability to the plaintiffs. But the defendant had given the plaintiffs authority to go and pledge his credit to a jobber on the Stock Exchange, and I am satisfied that according to the usage and the rules and regulations of the Stock Exchange the plaintiffs were liable to the jobber for the fulfilment of the contract. That appears to me to be manifest from two of the rules that have been referred to. [His Lordship read

rules 52 and 58.] The contract that the plaintiffs had entered into on behalf of the defendant was therefore a contract binding between them and the jobber.

The plaintiffs being in that position, being bound by the rules, which would have enabled the jobber to have them declared defaulters on the ground that the contract was not carried out, with all the consequences indicated by the rules in case of default, receive a notice that the defendant relies upon Leeman's Act (1). [His Lordship read the section.] That is, it shall be a contract binding in honour only, not enforceable in a Court of law. Did the defendant authorise such a contract? I am of opinion that he did. He had given similar instructions with reference to shares of the same description on previous occasions over and over again, and had received contract-notes without any reference to numbers. The defendant says he did not know of Leeman's Act (1). I am not concerned to enquire whether he did or not. I come to the conclusion that when he got this contract he got what he intended to order the plaintiffs to obtain for him. Having got the order in that form, the usage of the Stock Exchange comes in—the rules and regulations to which I have referred, which, upon the footing that the contract is in accordance with the ordinary course of business, are such that the plaintiffs might be expelled as defaulters or made liable by a summary order of the committee. The plaintiffs have placed themselves in that position, they have incurred that liability by the defendant's authority and on his behalf, and they are entitled to look to him for indemnity.

I fail to see any distinction between this case and *Read* v. *Anderson* (2). I must assume that parties dealing in matters of this sort are cognisant of the law. I must assume that the defendant knew, or might have known, that this contract would not be a binding contract unless the numbers were given, just as a man who authorises another to make a bet for him knows, or must be taken to know, that the contract he authorises on his behalf will not be enforceable in a Court of law. But if he gives that authority to a person who comes under personal liability by reason of having to obey the instructions of his principal, he must indemnify that person. It is idle to talk of revoking after the liability is incurred. Here the defendant went through the form of informing the plaintiffs that he did not intend to accept the contract and would not be bound by it. But, unfortunately, that did not affect the position of the plaintiffs. They were bound to the person with whom they dealt upon the faith of the defendant's authority. The point was, it appears, submitted to the committee of the Stock Exchange, who, acting upon the rule to which I have referred, came to the conclusion that the liability of the plaintiffs to the jobber was complete, and the plaintiffs were therefore obliged to pay. I see no reason for exonerating the defendant from liability.

The case of *Barclay* v. *Pearce* (3) is not, as Mr. Lumley Smith is entitled to say, a conclusive authority against him. But the point appears to have been discussed with reference to *Read* v. *Anderson* (2), and the Court appears to have indicated the view, on the authority of *Read* v. *Anderson* (2), that if the authority of the broker was established in that case, as it has been in this, the principal would be liable to indemnify the broker. It is as nearly as possible an authority, and none of the facts to which Mr. Lumley Smith has referred appear to me to distinguish this case from *Read* v. *Anderson* (2) or *Barclay* v. *Pearce* (3). My judgment, therefore, is for the plaintiffs, with costs.

Judgment for plaintiffs, with costs (6).

Solicitors—Godden, Holme & Co., for plaintiffs
Worthington Evans, for defendant.

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(6) See the next case (*Perry and another* v *Barnett*).

1885. Feb. 13, 14, 17. } PERRY AND ANOTHER v. BARNETT.

Principal and Agent—Stock Exchange, Rules and Usages of—Contract for Purchase of Bank Shares—Failure to specify Numbers of Shares—Void Contract—Payment by Stockbroker under pressure of Rules and Regulations of Stock Exchange—Ignorance of Principal—Leeman's Act (30 & 31 *Vict. c.* 29), *s.* 1.

A principal employing a stockbroker to purchase bank shares for him is not bound by the custom of the London Stock Exchange to disregard Leeman's Act (30 & 31 *Vict. c.* 29), *if the principal is in fact ignorant of the custom, inasmuch as the effect of the custom is to change the intrinsic character of the contract between buyer and seller.*

The plaintiffs, who were stockbrokers at Bristol and members of the Bristol Stock Exchange, having at the request of the defendant purchased through their agents in London, who were members of the London Stock Exchange, certain bank shares upon the London Stock Exchange, which the defendant afterwards refused to accept and pay for, on the ground that there was no valid contract of sale of the shares by reason of the provisions of Leeman's Act (30 & 31 *Vict. c.* 29), *were obliged to accept and pay for the shares in consequence of the operation of the usages and rules and regulations of the London Stock Exchange, according to which the London Stock Exchange does not recognise in its dealings any other persons than its own members, who, if they do not fulfil their engagements, may be declared defaulters and expelled from the Stock Exchange, and no application to annul a bargain is entertained by the Stock Exchange, except on the ground of fraud or wilful misrepresentation. The defendant was in fact ignorant of the usages, rules, and regulations of the Stock Exchange:*—Held, *that the plaintiffs were not entitled to recover from the defendant the price of the bank shares.*

Robinson *v.* Mollett (44 Law J. Rep. C.P. 362; Law Rep. 7 H.L. 802) *followed;* Read *v.* Anderson (53 Law J. Rep. Q.B. 532; Law Rep. 13 Q.B. D. 779) *and* Seymour *v.* Bridge (*ante*, p. 347; Law Rep. 14 Q.B. D. 460) *distinguished.*

Action tried in Middlesex before Grove, J., without a jury.

The plaintiffs' claim was for 565*l.* 10*s.*, for money paid and work done by them for the defendant as stockbrokers, and for commission.

The plaintiffs were stockbrokers carrying on business at Bristol, and were members of the Bristol Stock Exchange. On the 1st of May, 1884, the defendant, who resided at Clifton near Bristol, gave to the plaintiffs a verbal order to purchase for him 100 shares in the Oriental Bank for the next account-day—namely, the 15th of May. The 1st of May being a bank holiday, the plaintiffs promised the defendant to write on that day to their agents on the London Stock Exchange, and procure them to purchase the required shares on the following day. The plaintiffs accordingly on the 1st of May wrote to their agents, Carr & Co., stockbrokers on the London Stock Exchange, to purchase Oriental Bank shares in accordance with the defendant's verbal order. Carr & Co. received this letter on the morning of the 2nd of May, and on the forenoon of that day they purchased from Sidney Kennedy & Co., jobbers on the London Stock Exchange, the required shares. No written contract is in fact ever made between brokers and jobbers on the London Stock Exchange, and Leeman's Act (30 & 31 Vict. c. 29) is in fact disregarded on the Stock Exchange; each of the parties makes a memorandum of the transaction in his own note-book, the purchase being made for a specific day, called the account-day, on which day the names of the principals are exchanged between the brokers. In accordance with this usage, in the present case no written contract was entered into between Carr & Co. and Sidney Kennedy & Co. On the 2nd of May Carr & Co. telegraphed to the plaintiffs informing them of the purchase, and the plaintiffs on the same day sent a memorandum of the purchase to the defendant. This memorandum did not contain the numbers of the shares. On the morning of the 3rd of May, 1885, the Oriental Bank stopped payment, and on the same day the defendant, having heard of this, called upon the plaintiffs and repudiated the purchase. The plaintiffs wrote to Carr & Co. to get the

contract cancelled, on the ground that the numbers of the shares were not given; but Carr & Co. telegraphed a reply that the contract was binding on the London Stock Exchange, and promised to forward the numbers by post. On the 5th of May (the 4th of May being a Sunday) the plaintiffs received the numbers of the shares from Carr & Co. by letter, and on the same day sent to the defendant a memorandum or contract-note of the purchase setting forth the numbers of the shares; but the defendant declined to accept it.

The Rules and Regulations of the Stock Exchange provide as follows:—

Rule 52: "The Stock Exchange does not recognise in its dealings any other parties than its own members: every bargain, therefore, whether for account of the member effecting it or for account of a principal, must be fulfilled according to the rules, regulations, and usages of the Stock Exchange."

Rule 58: "No application which has for its object to annul any bargain in the Stock Exchange shall be entertained by the committee, unless upon a specific allegation of fraud or wilful misrepresentation."

Rule 144: "A member unable to fulfil his engagements shall be publicly declared a defaulter by direction of the chairman, deputy-chairman, or any two members of the committee."

Rule 145: "A member declared a defaulter in the Stock Exchange .... ceases to be a member."

Evidence was given that the defendant had on one occasion previously purchased bank shares, as in this case, on the London Stock Exchange through a broker at Bristol, which shares he afterwards sold, and that the memoranda of these transactions sent to the defendant did not set forth the numbers of the shares. The defendant, however, stated that he was ignorant of the rules and usages of the London or Bristol Stock Exchanges, and did not know that brokers were liable as principals upon contracts made by them. The learned Judge found as a fact that the statement of the defendant was true.

Finlay, Q.C. (*Horne Payne* with him), for the plaintiffs, submitted that the defendant must be taken to have known the usages of the Stock Exchange, and having employed the plaintiffs to purchase the shares in question according to the usages of the Stock Exchange, the plaintiffs, who had in consequence become personally liable to pay for the shares, were entitled to be indemnified by the defendant. They cited *Read* v. *Anderson* (1), *Barclay* v. *Pearce* (2), *Seymour* v. *Bridge* (3), and *Cory* v. *Patton* (4).

Lumley Smith, Q.C. (*T. Willes Chitty* with him), for the defendant, submitted that as the defendant was in fact ignorant of the rules and usages of the Stock Exchange he was not bound by them; and as, by reason of 30 & 31 Vict. c. 29. s. 1 (5), no valid contract for the purchase of the shares had been effected on the defendant's behalf, the defendant was entitled to withdraw the authority given to the plaintiffs before a binding contract was entered into. They cited *Robinson* v. *Mollett* (6), *Duncan* v. *Hill* (7), *Neilson* v. *James* (8), and *Grissell* v. *Bristowe* (9). They distinguished the present case from *Read* v. *Anderson* (1), *Barclay* v. *Pearce* (2), and *Seymour* v. *Bridge* (3), on the ground that in this case the defendant was ignorant of the rules and regulations under which the plaintiffs became liable to complete the transaction.

Finlay, Q.C., in reply.

GROVE, J.—The case of *Robinson* v. *Mollett* (6) has satisfied me that knowledge is essential in this case. I think there is a broad distinction between this case and the case of *Seymour* v. *Bridge* (3). The ground upon which I have come to the conclusion that the defendant is entitled to

(1) 53 Law J. Rep. Q.B. 532; Law Rep. 13 Q.B. D. 779.

(2) Not reported. An account of the case is given by Grove, J., in his judgment.

(3) *Ante*, p. 347; Law Rep. 14 Q.B. D. 460.

(4) 43 Law J. Rep. Q.B. 181; Law Rep. 9 Q.B. 577.

(5) *See* note (1), *ante*, p. 348.

(6) 44 Law J. Rep. C.P. 362; Law Rep. 7 H.L. 802.

(7) 40 Law J. Rep. Exch. 137; Law Rep. 8 Exch. 242.

(8) 51 Law J. Rep. Q.B. 369; Law Rep. 9 Q.B. D. 546.

(9) 38 Law J. Rep. C.P. 10; Law Rep. 3 C.P. 112.

my judgment is that I believe he did not know of this custom of the Stock Exchange. That being so, is this a custom which an outsider is bound by without knowledge? I am of opinion that it is not, and that "if a person" (to use the language of Lord Chelmsford in *Robinson* v. *Mollett* (6)) "employs a broker to transact business for him upon a market with the usages of which the principal is unacquainted, he gives authority to the broker to make contracts upon the footing of such usages, provided they are such as regulate the mode of performing contracts, and do not change their intrinsic character." Adopting that language, is it possible to say that the custom in this case does not change the intrinsic character of the contract? It makes the whole thing a different thing. It makes that a contract for one purpose which is not a legal contract at all, and which the defendant could not get fulfilled as a contract. The order from the defendant to his broker is—"Buy me 100 shares in the Oriental Bank." The broker sends to his agent broker in London to buy 100 shares, and the broker sends back a note which would appear to be a contract which the buyer himself could enforce against the seller, but which in consequence of Leeman's Act (5) is no contract at all. Therefore the defendant does not get what he bargains for. But then it is said there is a usage of the Stock Exchange by which you can get, not an invalid contract made virtually valid so as to put you in the position of a person who can enforce his contract, but a contract by which the agent you have employed, or, as in this case, the agent of the agent you have employed, is put in such a position that he may be personally liable to fulfil his contract, and, if not, may be dismissed the Stock Exchange. If the buyer knew of that, and if he contracted upon the basis of that, he may be held, as in *Read* v. *Anderson* (1), to be liable, because he has knowingly made the broker subject to certain liabilities in consequence of effecting an order in such a manner as the person ordering knew it must be effected. But can it be said that that consequence is to affect a person who is perfectly ignorant, and who thinks when he orders a man to enter into a contract that a contract means a contract—that is, a contract enforceable at law? Can it be said that he is to be affected by that which is not a contract and which will not give him the benefit of a contract? That being the case, there is a broad distinction between this case and *Read* v. *Anderson* (1), and also, so far as the judgment of the Court goes, between this case and *Barclay* v. *Pearce* (2), as I will presently shew.

With regard to *Seymour* v. *Bridge* (3), Mr. Justice Mathew based his judgment upon the assumption that the defendant did know of the usage in point of fact, or at all events, from the repeated transactions which took place between the parties, Mr. Justice Mathew took him to know of it. The case is quite different here. Here there was really only one previous transaction, the single occasion on which he purchased the bank shares, by which the defendant could get at knowledge, and I do emphatically believe the defendant when he says that he did not know that the brokers were liable to the jobber. Does that make a difference between this case and the cases of *Read* v. *Anderson* (1), *Seymour* v. *Bridge* (3), and *Barclay* v. *Pearce* (2)? In *Read* v. *Anderson* (1) Lord Justice Bowen, in delivering the judgment of the majority of the Court, says there was a usage known to both parties that the betting agent became liable. There is also this distinction between that case and the present, that not only was the usage known to both parties, or, which is the same thing, taken by the Court to be known, but the thing was actually effected which the agent was commissioned to do. He was commissioned to make a bet, not a contract, and I do not think it would be very far-fetched to assume, though it is not very material, that the person employing the agent did know that betting was illegal, because that is general and common knowledge. He also knew, as Lord Justice Bowen states, that the agent would be liable to be dismissed the turf if he did not pay the bet. The agent having performed his part of the contract by making a bet, although he would not be liable to the person with whom he bet except in the *forum* of honour among betting people, still his principal must be liable to pay him if the

bet were lost. The Court in that case expressly relies upon the knowledge of the usage by both parties. Now in *Barclay* v. *Pearce* (2) the case is still stronger. That case appears to have been exactly similar in its circumstances, except in the matter of knowledge, to the case before my brother Mathew. The question there was whether the plaintiff should have judgment under Order XIV., or whether the defendant should have leave to defend upon paying the money into Court or giving security. The Court of Appeal required the defendant to pay the money into Court or find security as a condition of defending. The Court did allow the defendant to defend—possibly upon the ground that they thought he might have a right to take the decision of the House of Lords—I do not know whether that was so or not, but at all events I gather from the report of the case, which Mr. Finlay has handed up to me, that the members of the Court rest their judgment upon the knowledge emphatically possessed by the defendant. These cases appear to have gone to the extreme limit, because in *Read* v. *Anderson* (1) the Court was divided, two of the Judges thinking one way and two the other. Am I to go a step further, and say that where a party is ignorant of a usage which not merely alters some of the incidents but alters the intrinsic character—to use the language of Lord Chelmsford—of a bargain, because it substitutes a mere honourable engagement between brokers on the Stock Exchange for a valid legal contract, he is still bound by that usage? I am of opinion that he is not bound. I am also of opinion that *Neilson* v. *James* (8) is in favour of the opinion I have come to. Therefore my opinion is that the defendant is entitled to my judgment.

Judgment for defendant with costs.

Solicitors—Ley & Lake, agents for Danger & Cartwright, Bristol, for plaintiff; Meredith, Roberts & Mills, agents for Vassal, Parr, Osborne & Ward, Bristol, for defendant.

[IN THE QUEEN'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

BANKRUPTCY. 1885. March 25. April 1, 24, 27, 28. } *In re* BARNETT; *ex parte* REYNOLDS AND CO.*

Bankruptcy—County Court—Jurisdiction of, in Bankruptcy—Action in High Court against Trustee of Bankrupt—Power of County Court to restrain—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 100 *and* 102—*Right of Solicitor to Audience in High Court in Bankruptcy Matters*—46 & 47 *Vict. c.* 52. *s.* 151.

A County Court which has by the Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 100, *for the purposes of its bankruptcy jurisdiction, in addition to the ordinary powers of the Court, all the powers and jurisdiction of the High Court, and, by section* 102, *full power to decide all questions of priorities and all other questions which may arise in any cases of bankruptcy coming within the cognisance of the Court, does not thereby acquire and has not jurisdiction to restrain an action brought in the High Court against the trustee of a debtor adjudicated a bankrupt in the County Court:*—So held *by the Court of Appeal, reversing the decision of the Queen's Bench Division.*

Solicitors have, by virtue of the reservation in the Bankruptcy Act, 1883, *s.* 151, *right of audience in the High Court on appeals from the County Courts in bankruptcy:*—So held *by the Queen's Bench Division.*

Application was made by the trustee of the bankrupt to the Judge of the Croydon County Court, where the adjudication of bankruptcy was made, to restrain proceedings in an action brought in the High Court against the trustee, and to determine the question raised in the action, the facts in relation to the application being, so far as they need to be here stated, as follows:—

The debtor, Barnett, who was a builder, was adjudicated bankrupt in the County Court on the 30th of October, 1884. At the time of the bankruptcy Barnett had in

* *Coram* Brett, M.R., Baggallay, L.J., and Bowen, L.J.

his possession some machinery which he used in his business. He had this machinery from F. W. Reynolds & Co. on the hire-purchase system, by which he was to pay the purchase-money, 473*l.* 5*s.*, by instalments. At the time of the bankruptcy he had paid only 270*l.* As soon as the trustee in the bankruptcy was appointed, Reynolds & Co. claimed this machinery from the trustee; but the trustee claimed it as having been in the possession, order, and disposition of the bankrupt at the time of the bankruptcy. Negotiations followed, but the matter was not arranged; Reynolds & Co. threatened to take legal proceedings; the trustee thereupon, on the 1st of December, said that he would at once apply in the bankruptcy to have the question decided.

On the 2nd of December Reynolds & Co. issued a writ in the High Court against the trustee, claiming the return of the machinery or the payment of its value, and 200*l.* for its detention, and subsequently a statement of claim was delivered, in which Middlesex was named as the place of trial. In January, 1885, the trustee obtained leave to deliver, and delivered, short notice of motion in the County Court for an order restraining that action, and asking the County Court Judge to determine the question which formed the subject-matter of the action.

The County Court Judge heard the motion, and refused the application. The trustee appealed to the High Court.

J. E. Fox, solicitor, appeared for the trustee, in support of the appeal.

Poyser (*Pollard* with him), for the respondents, objected to the solicitor being heard.—A solicitor has no right of audience in the High Court upon an appeal in bankruptcy from a County Court. No doubt the Bankruptcy Act, 1883, s. 151, enacts that, ". . . . all solicitors or other persons who had the right of audience before the Chief Judge in Bankruptcy shall have the like right of audience in bankruptcy matters in the High Court." But by section 104, sub-section 2 (*a*), an appeal from an order of a County Court in a bankruptcy matter lay not to the High Court but to the Court of Appeal: consequently after the passing of that Act a solicitor had clearly no such right of audience as is now claimed. And the Bankruptcy Appeals (County Courts) Act, 1884 (47 & 48 Vict. c. 9), which repeals the Bankruptcy Act, 1883, s. 104, sub-s. 2 (*a*), and instead thereof enacts that "an appeal shall lie in bankruptcy matters . . . . from the order of a County Court to a Divisional Court of the High Court of Justice . . . ," cannot be held to give to solicitors a right of audience which they did not possess under the Act of 1883, and which, moreover, would be a new right.

[CAVE, J.—Under the Bankruptcy Act, 1869, an appeal lay from a County Court to the Chief Judge in Bankruptcy, and solicitors had the right of audience upon such an appeal.]

This is an appeal to a Divisional Court and not to a single Judge, and the Act of 1883, s. 151, says only that solicitors and other persons who had the right of audience before the Chief Judge in Bankruptcy are to have the "like" right of audience in the High Court.

THE COURT (1).—The right of audience claimed must be conceded. This appeal is a bankruptcy matter in the High Court just such as the Chief Judge in Bankruptcy could have heard under the Act of 1869, and a solicitor would have had the right of audience before him upon it; therefore the right of audience claimed falls clearly within the terms of the Bankruptcy Act, 1883, s. 151.

Fox was accordingly heard upon the merits.

Poyser, contra.

Fox, in reply.

The arguments appear sufficiently in the judgment of the Court (1) delivered on April 1 by

CAVE, J.—This is an appeal from an order of the County Court Judge at Croydon, refusing to stay further proceedings in an action brought by F. W. Reynolds & Co. against the trustee, and also refusing to determine a question which had arisen between Reynolds & Co. and the trustee in the bankruptcy, and formed the subject-matter of the action.

Barnett, who was formerly a builder at Shootlands, was adjudicated bankrupt on

(1) Cave, J., and Wills, J.

the 30th of October, 1884, and the appellant was appointed trustee on the 4th of November. At the time of his bankruptcy Barnett had in his possession some machinery, which he used in his business, and which he had got from Reynolds & Co. under an agreement of the 11th of April, 1883, on what is known as the "purchase-hire system." Under this agreement Barnett was to have paid the purchase-money of the machinery, 473*l.* 5*s.*, by instalments; and at the time of his bankruptcy he had paid only about 270*l.* As soon as the trustee had been appointed, Reynolds & Co. laid claim to the machinery in question, and negotiations ensued; and ultimately, on the 29th of November, Reynolds & Co.'s solicitors wrote to the trustee that they had heard nothing from his solicitor, and were instructed to take legal proceedings if the matter was not satisfactorily arranged before one o'clock on the following Monday, the 1st of December. On that day the trustee's solicitor called on Reynolds & Co.'s solicitors, and informed them that the trustee would at once apply to the Court of Bankruptcy to decide as to the ownership of the machinery in question, which the trustee claimed as having been in the possession, order, and disposition of the bankrupt at the time of the bankruptcy. On the 2nd of December Reynolds & Co.'s solicitors issued a writ against the trustee claiming return of the machinery, or 473*l.* 5*s.*, its value, and 200*l.* for detention; and a statement of claim to the same effect was subsequently delivered, in which Middlesex was named as the place of trial. On the 6th of January, 1885, the trustee obtained leave to deliver, and delivered, short notice of motion for an order, which, as has been stated, the Court refused to make, and against which refusal this appeal is now brought.

In order to understand the point in dispute it is necessary to consider the old law. Section 72 of the Act of 1869 was as follows: "Subject to the provisions of this Act, every Court having jurisdiction in bankruptcy under this Act shall have full power to decide all questions of priorities and all other questions whatsoever, whether of law or fact, arising in any case of bankruptcy coming within the cognisance of such Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case." Questions soon arose as to the extent of the jurisdiction given by this section, and ultimately the general principle was laid down that where a trustee claimed only the same right as the bankrupt himself would have had, the Court of Bankruptcy ought not to assume jurisdiction, but ought to leave the matter to be dealt with by the ordinary tribunals—*Ellis* v. *Silber* (2); but that where, by the operation of the law of bankruptcy, the trustee had a higher and better title than the bankrupt, the Court of Bankruptcy ought to decide the matter itself—*Ex parte Brown; in re Yates* (3). This rule, however, was not an inflexible one, and did not preclude the Court from exercising a discretion not to assume the trial of the case. Thus, where considerable property was at stake, and questions seriously affecting character were involved, it was held that the case ought to be tried in the High Court and not in a County Court—*Ex parte Armitage; in re Learoyd & Co.* (4) and *Ex parte Price; in re Roberts* (5).

This was the state of the law when the Act of 1869 was repealed and that of 1883 came into operation. The first clause of section 102 of the later Act is the same as that part of section 72 of the earlier Act which I have already read. But section 102 contains this very material proviso: "Provided that the jurisdiction hereby given shall not be exercised by the County Court for the purpose of adjudicating upon any claim not arising out of the bankruptcy which might heretofore have been enforced by action in the High Court, unless all parties to the proceeding consent thereto, or the money, money's worth, or right in dispute does not, in the opinion of the Judge, exceed in value 200*l.*" Now it seems to us that this proviso is intended to enforce the jurisdiction of the Court of Bankruptcy, and even to extend it to cases

(2) 42 Law J. Rep. Chanc. 666; Law Rep. 8 Chanc. 83.

(3) 48 Law J. Rep. Bankr. 78; Law Rep. 11 Ch. D. 148.

(4) Law Rep. 17 Ch. D. 13.

(5) 52 Law J. Rep. Chanc. 131; Law Rep. 21 Ch. D. 553.

where it has been excluded by previous decisions. The proviso does not extend to claims "arising out of the bankruptcy"—that is, as we understand it, to cases where, by the operation of the law of bankruptcy, the trustee has a higher and better title than the bankrupt, and these cases consequently are governed by the general rule laid down in *Ex parte Brown* (3). It does extend to other cases arising in the bankruptcy, including cases where the trustee claims only the same right as the bankrupt would have had; and as to these cases it lays down the new principle that the Court is to exercise jurisdiction where the parties consent or where the amount in dispute does not exceed 200*l.*

The present case is one of those in which the trustee, by the operation of the law of bankruptcy, had a higher and better title than the bankrupt, and we agree, therefore, with his Honour that the Court had jurisdiction, although the parties did not consent and the value of the subject-matter exceeded 200*l.*; and the only question is whether the case falls within the exception to the general rule recognised in *Ex parte Armitage* (4) and *Ex parte Price* (5). No questions of character are involved, and the amount in dispute is in itself comparatively unimportant; but it is alleged, as grounds for the refusal of the Court to exercise its jurisdiction, that the trustee was guilty of delay in taking proceedings: that the claim might be more expeditiously disposed of by allowing the action to proceed: that the question is one of importance to Reynolds & Co., who have machinery to the value of 30,000*l.* or 40,000*l.* on hire: and that they wanted to have the case tried by a jury. There seems to be no ground for the imputation of delay. The trustee was only appointed on the 4th of November; negotiations were proceeding down to the 24th of November, and on the 1st of December he gave informal notice of his intention to apply to the Court; Reynolds & Co. somewhat hastily issued a writ on the 2nd of December, and the trustee applied to the Court on the 6th of January. As to relative expedition of proceedings, his Honour might have fixed a day for the hearing in February and have disposed of the case in that month, while at present there seems no probability that the action in the High Court will be heard before Whitsuntide As to the third ground, the decision in this case will not necessarily govern others; nor, if it would, does it seem alone a sufficient reason for declining a jurisdiction which is clearly given by the statute. The last ground, which seems to have weighed most with his Honour, and but for which probably he would have exercised his jurisdiction, seems to have been put forward solely for the purpose of influencing the mind of the Judge. Now that it has done its work it has been dropped, and the case has been set down by the plaintiffs for trial without a jury.

After a careful consideration of these grounds, we are of opinion that this case falls within the general rule and not within the exception, and that the case must be remitted to the County Court Judge for hearing. We would suggest that it would be convenient, looking at the nature of the question to be tried, that the Judge should direct the trustee to give notice of motion for a particular day to be fixed by the Judge, and that the case should be heard on *viva voce* evidence without affidavits.

This disposes of the substantial question in the case; but a subsidiary, though important, question arises—namely, whether the trustee is entitled to an order restraining Reynolds & Co. from continuing proceedings in the action. Mr. Poyser contended that the County Court, as a Court of Bankruptcy, has no jurisdiction at present to restrain an action in the High Court. That jurisdiction, it is argued, was conferred under the Act of 1869, by section 66 of that Act, which gave the County Court all the powers and jurisdiction of the Court of Chancery; while section 100 of the present Act gives the County Court all the powers and jurisdiction of the High Court, which powers do not include the power to restrain an action in the High Court, seeing that by the Judicature Act of 1873, s. 24, sub-s. 5, no cause or proceeding in the High Court is to be restrained by prohibition or injunction. We think, however, that the power of the Court of Bankruptcy to restrain actions was not conferred by section 66 of the Act of 1869.

The Court of Bankruptcy appears always to have exercised a jurisdiction analogous to that of the Courts of equity by way of

injunction. Thus in *Ex parte Figes* (6) the Court, on an *ex parte* application on behalf of the bankrupt, restrained the assignees from selling the property until further order. So in *Ex parte Harding* (7) the Court granted an injunction to restrain the negotiation of a promissory note. Again in *Ex parte Leigh* (8) the Court restrained the bankrupt from proceeding in an action at law which he had commenced to contest the validity of the commission. The powers of the Court over parties other than the bankrupt and his creditors were much extended by section 72 of the Act of 1869; and in 1871 it was decided by the Court of Appeal in *Ex parte Cohen* (9) that in cases to which that section was intended to apply the Court of Bankruptcy had power to restrain actions. That decision was followed by many others in which injunctions were granted, such as *Morley* v. *White* (10), *Ex parte Gordon* (11), and *In re Thorpe* (12); and in none of them is the jurisdiction to restrain an action treated as depending on section 66 of the Act, but rather as an exercise of the ordinary powers of the Court brought into play by section 72. In *Ex parte Ditton* (13) it was contended that by virtue of section 24, sub-section 5, of the Judicature Act of 1873 the Court of Bankruptcy had lost its power to restrain actions in the High Court by injunction; but it was held that there was no doubt whatever that the jurisdiction of the Court of Bankruptcy to restrain proceedings in other Courts still existed, that there was nothing in the Judicature Act which interfered with the jurisdiction of the Court of Bankruptcy as it existed before those Acts, and that section 24 of the Act of 1873 only provided rules for the manner in which the High Court of Justice should carry on its own proceedings. Section 100 of the Act of 1883 provides that a County Court shall for the purposes of its bankruptcy jurisdiction, in addition to the ordinary powers of the Court, have all the powers and jurisdiction of the High Court; and the ordinary powers of the Court which are hereby preserved appear to us to include the power of restraining actions which the Court of Bankruptcy seems always to have exercised, and which in some form or other is absolutely necessary to its existence as an effective Court.

It was urged that the observations of Lord Justice Mellish in *Ex parte Ditton* (13) as to the effect of section 73 of the Judicature Act of 1873 are equally cogent as to the effect of section 93 of the Bankruptcy Act of 1883. The Lord Justice there expressed an opinion that if the alteration made by the 9th section of the Judicature Act of 1875 had not been made, and if, consequently, the London Court of Bankruptcy had been united and consolidated with the High Court, the County Courts acting in bankruptcy would have retained their power of granting injunctions, while the London Court of Bankruptcy would not. If, it was argued, the London Court has by the effect of section 93 of the Act of 1883 lost its power of granting injunctions, it is anomalous that the County Courts should retain that power. But if the London Court has lost the power of granting injunctions—on which it is not necessary to give an opinion to-day—it has by the union with the High Court acquired a power almost equally valuable. As a member of the Queen's Bench Division of the High Court, the Judge in Bankruptcy has jurisdiction to stay any proceedings in that division; and he would not, we apprehend, hesitate, upon a proper case being made, to direct the trustee to apply for a stay of proceedings in the Chancery Division, should such a step ever become necessary. The case of *Cobbold* v. *Pryke* (14) does not deal with the powers of the County Court as a Court of Bankruptcy, and is distinguishable on that ground.

We therefore come to the conclusion that the trustee is entitled to an injunction restraining Reynolds & Co. from proceed-

(6) 1 Glyn & J. 122.
(7) Buck, 24.
(8) 2 Glyn & J. 332.
(9) 41 Law J. Rep. Bankr. 16; Law Rep. 7 Chanc. 20.
(10) 42 Law J. Rep. Chanc. 880; Law Rep. 8 Chanc. 214.
(11) 42 Law J. Rep. Bankr. 41; Law Rep. 8 Chanc. 555.
(12) 42 Law J. Rep. Bankr. 34; Law Rep. 8 Chanc. 743.
(13) 45 Law J. Rep. Bankr. 87; Law Rep. 1 Ch. D. 557.
(14) 49 Law J. Rep. Exch. 8; Law Rep. 4 Ex. D. 315.

ing with their action until further order; but he must give an unqualified undertaking to be answerable for damages and to proceed with the motion in the Court below with due diligence.

The trustee must have his costs of this appeal, and the costs in the Court below must abide the result of the motion to be made, unless the Judge shall see reason to direct otherwise.

Appeal allowed.

Poyser asked for leave to appeal.

The Court (1) granted leave.

Reynolds & Co. appealed.

Pollard and *Poyser*, for the appellants.—First, the County Court as a Court of Bankruptcy has no power to try the questions raised in the action, if the action be restrained, because under the proviso to section 102, sub-section 1 (15), the claim does not "arise out of the bankruptcy," but it may be enforced by action in the High Court, for the parties do not consent, and the right in dispute exceeds 200*l*. Secondly, the County Court as a Court of Bankruptcy has no power to restrain an action in the High Court. The power to restrain was given by section 66 of the Act of 1869 (32 & 33 Vict. c. 71), while section 72 pointed out the subject-matter on which it was to be exercised. Those sections are repealed, and the analogous provisions of the Act of 1883 (46 & 47 Vict. c. 52), which are found in sections 100 and 102, do not confer that power, for they give to the County Court sitting in Bankruptcy, not the powers of the abolished Court of Chancery, but the powers of the High Court, which do not, since the Judicature Act of 1873, include the power of restraining actions by injunction. *Ex parte Ditton* (13), *Ex parte Anderson* (16), *The Queen* v. *The Judge of the County Court at Croydon* (17), and *Cobbold* v. *Pryke* (14) were cited. Thirdly, even if the County Court Judge can when sitting in Bankruptcy restrain proceedings in the High Court, still if he has exercised his discretion, and has declined to do it, that exercise of discretion ought not to be overruled: so that the order of the Divisional Court should on that ground be set aside. *Ex parte Brown* (3), *Ex parte Armitage* (4), and *Ex parte Price* (5) were referred to.

Bigham, Q.C., and *Eady*, for the respondent the trustee.—A Judge of a County Court when sitting in Bankruptcy can restrain a stranger from proceeding with an action against the trustee in respect of something which arises out of the bankruptcy. He can restrain a creditor under section 10, sub-section 2. Under the Act of 1869 he could so restrain proceedings pursuant to the provisions of section 72—*Snow* v. *Sherwell* (18), *Halliday* v. *Harris* (19), and *Ex parte Cohen* (9).

[BRETT, M.R.—Those cases do not decide that the power was conferred by section 72 rather than by section 66 of 32 & 33 Vict. c. 71.]

But under that Act a restraining order could be granted; and it was held in *Ex parte Ditton* (13) that the Judicature Act of 1873 did not apply to County Courts, and that the provisions relating to this

(15) 46 & 47 Vict. c. 52. s. 100: "A County Court shall, for the purposes of its bankruptcy jurisdiction, in addition to the ordinary powers of the Court, have all the powers and jurisdiction of the High Court, and the orders of the Court may be enforced accordingly in manner prescribed."

Section 102 (1): "Subject to the provisions of this Act, every Court having jurisdiction in bankruptcy under this Act shall have full power to decide all questions of priorities, and all other questions whatsoever, whether of law or fact, which may arise in any case of bankruptcy coming within the cognisance of the Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case:

"Provided that the jurisdiction hereby given shall not be exercised by the County Court for the purpose of adjudicating upon any claim not arising out of the bankruptcy which might heretofore have been enforced by action in the High Court, unless all parties to the proceedings consent thereto, or the money, money's worth, or right in dispute does not in the opinion of the Judge exceed in value two hundred pounds."

Section 168 (1): "In this Act, unless the context otherwise requires, 'the Court' means the Court having jurisdiction in bankruptcy under this Act."

(16) 39 Law J. Rep. Bankr. 49; Law Rep. 5 Ch. App. 473.

(17) 53 Law J. Rep. Q.B. 545; Law Rep. 13 Q.B. D. 963.

(18) 25 W.R. 433.

(19) 43 Law J. Rep. C.P. 350; Law Rep. 9 C.P. 668.

matter contained in section 24 of that Act were provisions relating to procedure only. The result of the legislation of 1883 is that although the London Bankruptcy Court cannot restrain actions, yet the Courts sitting as Bankruptcy Courts can still do so. Section 100 (15) of the Act of 1883 provides that a County Court shall, in addition to the ordinary powers of a County Court sitting in Bankruptcy, have certain other powers, and sections 100, 102, and 168 (15) of this Act have the same effect as sections 66 and 72 of the Act of 1869. But, besides that, the County Court sitting in Bankruptcy has this power expressly conferred on it by section 10, sub-section 2, of the Act of 1883, for that section provides that the Court may stay any action against the property of the debtor.

[BRETT, M.R.—How does that empower the Court to stay an action against the trustee?]

Because the trustee is dealing with the property of the debtor.

BRETT, M.R.—In this case there were bankruptcy proceedings in a County Court, the bankrupt being a builder who was alleged to have hired certain machinery for the purpose of his business. The persons who allege that they are the owners of that machinery brought an action in the Queen's Bench Division against the trustee in the bankruptcy to recover the machinery. In answer, it was admitted that the machinery was not the property of the bankrupt, but it was said that it was in his order and disposition at the time of the bankruptcy. The County Court Judge, having to administer the bankruptcy law in his Court, found that there was such an action pending in the Queen's Bench Division, and that the question was one of order and disposition, and he came to the opinion that the question would depend on whether it is well known amongst people dealing with builders that the latter are in the constant habit of hiring machinery for their business, so that no one dealing with them ought, in giving them credit, to rely upon the fact that there is machinery in their disposition, or ought to assume as a matter of course that it is their machinery. That is most important to the whole business of builders and to people dealing with them. It is a matter of the greatest importance to them, and one which has nothing of law in it, but which depends upon a considerable knowledge of business. Wherever such a question arises, it must for a certain time be a question whether such knowledge does or does not exist, or whether that constant habit does or does not exist in the business, and whether it is known to the people dealing with the particular class of tradesmen; and that must be tried upon the evidence given in the particular case. I think it must be tried more than once; but if it is proved and adopted by the superior Courts several times, then the Courts will take judicial notice of it, and will not require it to be proved in each particular case. Therefore the first trial of such a question is of the utmost importance to a large class of people. How were these cases treated formerly, from the time of Lord Mansfield downwards? Of course by a Judge and jury. In my opinion, after these cases were tried several times, the Courts rested upon this, that they had separate findings that men of business did know of the habit, and that people dealing with certain classes of people knew it, or, if it was a custom, that it was known. Therefore there would not be one finding of a jury, but findings of several juries when the question would have been mooted and known and the best evidence given; and it was in consequence of that general acquiescence of the Courts that the Courts adopted the findings and would not send a case again to be tried. Therefore in the present case, the question having been raised almost for the first time, the case is, in my opinion, precisely one which, for the benefit of trustees in bankruptcy, for the benefit of trade, and for the advantage of all the Courts, should be tried by a superior tribunal; and, notwithstanding the advice said to be given to the parties in this case, it would be satisfactory for the suitors and for the Courts that the question should be tried by a Judge and a jury, and not by a Judge alone, so that the question may be settled in a way which in the future the Courts will adopt. I do not say that if such a question were tried now by a Judge alone

the Courts would not after a time adopt the successive opinions of different Judges; but it cannot be pretended that Judges can have the same knowledge of business as a jury of business men. To my mind the present case is pre-eminently one for a Judge and jury. It is true to say that there is an advantage in having such a case tried by a Judge of the High Court, even without a jury, because there is an appeal, and there is not only the opinion of a single Judge, but also of the Court of Appeal on the evidence given before him; but still it has not the weight on a matter of business that a trial by jury would have. The present action is one in which that sort of question must be raised. When the motion was made before the County Court Judge to proceed with the bankruptcy, he thought it better not to try the question himself, but to leave it to a superior tribunal; and, as I understand, it being stated to him that it would be tried by a jury, he thought it better for him to wait, and stated that whether he was obliged to do so or not he would act upon the judgment obtained in that way.

The case, however, went to a Divisional Court, which was of a different opinion, not, as I gather, upon the line of reasoning which I have stated, but on the more general view that since the Judicature Act it is desirable that when a Court is once seized of a case, everything in the case should be decided in that Court. That is the general rule; but, as a matter of discretion, I think it is not applicable to this case, and I think that the Judges overlooked the reasoning which is applicable to this particular kind of case.

When the case was on appeal from the County Court Judge who had exercised a discretion, the Divisional Court came to a most important decision. They were of opinion that the County Court Judge would have had power under the Bankruptcy Act to issue an injunction to the parties not to proceed with the action which was in the High Court. They came to the conclusion that he ought to have exercised that power, and then, acting as if in his place, they issued an injunction, and declared that the proper order to have been made by him was to issue an injunction to the High Court. On appeal from that decision, it was first urged that the County Court Judge had no power to issue such an injunction; secondly, that if so, then no other question could arise upon this appeal—so that the question whether he had properly exercised his discretion could not arise; and thirdly, that if he had the power, he had exercised his discretion, and that the Court ought not to have set aside his discretion. On the other side it was said, first, that he had the power, and that if he had exercised his discretion rightly, he would have issued an injunction; and secondly, that even if he had not the power, yet the case is to be treated here as if a motion had been made in the High Court to absolutely stay the action which is there and to leave the case to be tried in the County Court.

The first question is, whether it is true to say that a County Court exercising bankruptcy jurisdiction has now power to issue an injunction to those who are parties to an action in the High Court not to proceed with that action. The power of County Courts in Bankruptcy is now to be determined by the Bankruptcy Act of 1883 alone. This is not a question of what matters are within its jurisdiction to deal with in bankruptcy, but as to what power it has to deal with matters which are within it. The subject-matter of its jurisdiction in bankruptcy is contained in section 102, and that the question whether goods are in the order and disposition of a bankrupt is an enquiry within the jurisdiction of the County Court is clear. But what power has a County Court, when such a question is before it, to restrain the parties by injunction from trying the same question in the High Court? The powers of the County Court are given in section 100, which says that "A County Court shall, for the purposes of its bankruptcy jurisdiction,"—that is, in respect of matters which are within its bankruptcy jurisdiction—"in addition to the ordinary powers of the Court," have certain powers. It has been said that "Court" in that clause means Bankruptcy Court—that is, that it was the old Bankruptcy Court. But that is contrary to the ordinary meaning of the word, which, when read according to ordinary English grammar, does not apply to the old Bankruptcy Court, but refers to

the words which are used at the beginning of the sentence — namely, "a County Court." The section continues, that the Court "shall have all the powers and jurisdiction of the High Court." That applies to procedure, and gives the County Court all the powers of the Chancery and Queen's Bench Divisions. It was said that because the section gave the County Court the jurisdiction of the High Court, it gave it the powers which the Court of Chancery had and the Queen's Bench Division has not; but that when the two jurisdictions are mixed up, a jurisdiction is made which neither division of the High Court has. But the meaning is, that the Court is to have all the powers and jurisdiction of the Chancery or the Queen's Bench Division according as the matter belongs to each division. But no division of the High Court can now restrain by injunction another division. It is further said that the cases shew that this particular jurisdiction as to injunction is not given by section 100, but is a necessary implication from section 102. The argument was founded upon this, that section 102 is in the same terms as section 72 of the Bankruptcy Act, 1869, and that section 72 gave the jurisdiction. The first case cited in support of that was *Snow* v. *Sherwell* (18). Certainly the only colour for saying that is the head-note; for neither of the Judges says so. The Master of the Rolls, Sir G. Jessel, was not referring to the jurisdiction to grant an injunction, but to the question whether the subject-matter was within the jurisdiction, and that of course depended on section 72. But there could be no question, with regard to anything which was the subject-matter of bankruptcy within section 72, that the County Court had jurisdiction by reason of section 66 of the Act of 1869. That section was not in the same terms as section 100 in the Act of 1883, for by section 66 of the Act of 1869 the Court is to have the powers of "the Court of Chancery," and not of "the High Court," for that did not then exist. It could not be denied that the Court of Chancery had the jurisdiction; and therefore the only question was whether the subject-matter of the enquiry was within section 72, for, if so, the jurisdiction existed under section 66. I shall not go through the case of *Halliday* v. *Harris* (19), for the same observation seems to apply exactly to that. The difference between the Act of 1869 and the Act of 1883 is that the words are different with regard to this, that in the one case the County Court was given the jurisdiction of the High Court of Chancery, which does not now exist, but by the Act of 1883 the jurisdiction given is that of the High Court.

It is not denied that neither the Chancery nor the Common Law Division of the High Court can issue an injunction with respect to an action in another division, though with regard to an action in a division of the Court there is in each division power to stay any action. Nor is it really denied that the Judge of the London Bankruptcy Court, who is now a Judge of the High Court, has not this power; and, to my mind, it is not a necessary implication from section 102 that the County Court Judges have this power. If there is a case pending in the High Court, and a motion to stay is made in that Court, the Court will have to consider whether it is a proper case to stay, inasmuch as the question can be tried in the County Court in the bankruptcy. If upon such a motion the Court thinks the case is such as should be tried in a superior Court, and they find that a Judge in the Bankruptcy Court states that he is willing to abide by the the event of such a trial (and I think that no County Court Judge would act otherwise), then I can see no inconvenience. But it seems to me that the County Court Judge has not jurisdiction to issue such an injunction. It is said that we ought to treat this matter as if the Divisional Court had ordered a stay of proceedings. I think that when the question is raised as it is here, we ought not to do that. I think that the Divisional Court had no power upon the appeal to stay the action which was in that Court. It was not a mere matter of form. Nor do I think the Divisional Court ought to have stayed the proceedings, because, as was suggested, there was a binding rule laid down in *In re Yates; ex parte Brown* (3), that in such a case as this, where the question is as to order and disposition, the trustee has a greater right than the bankrupt himself, that the rule is that such a case should be tried in the

Bankruptcy Court, and that no issue should be allowed at the same time in the High Court. But I do not think that it was intended in that case to lay that down as a rule absolutely binding in all cases. For in *Ex parte Armitage* (4) Lord Justice James, who is supposed to have laid that down as a binding rule, states in terms that he did not mean to so lay it down, and that the question must be decided in each case as a matter of discretion. Therefore, upon that point, it seems to me that the appellant succeeds in this case. It seems to me that the Divisional Court acted on the view that, under the Judicature Act, where a matter is in two Courts, it should be dealt with in one; and that they overlooked, first, the view that there is no power to restrain by injunction, and, secondly, the real merits of the case; and that on such a question as this it was most valuable to the trade and to the two Courts that such a case should not be tried in the County Court, for the decision of the County Court Judge would not have the same authority in the other Courts for the future, so that the case would have to be tried each time in the County Court, and the custom might be held to be different in the different divisions of the kingdom, whereas, if it is a custom at all, it is general, and should be held to be the same throughout the kingdom.

BAGGALLAY, L.J.—The question is, whether the Bankruptcy Act, 1883, has not altered what before that Act may have been considered to be the powers and practice of the Bankruptcy Court. In 1869, powers corresponding to those of the London Bankruptcy Court were conferred on the County Courts, as appears from reference to 32 & 33 Vict. c. 71. ss. 65 and 66. Reliance has also been placed on section 72 of that Act as giving a general jurisdiction to determine all questions necessary to be determined for the distribution of the bankrupt's property amongst his creditors.

In 1870 the case of *Ex parte Anderson* (16) was decided, and if the judgment of Lord Justice Giffard be read, it will be seen that it was decided on the joint operation of sections 66 and 72. Since that decision the Judicature Act of 1873 has been passed, which enacts, in section 24, sub-section 5, that "No cause or proceeding at any time pending in the High Court of Justice, or before the Court of Appeal, shall be restrained by prohibition or injunction." Before that Act came into force the amending Act of 1875 was passed, which excluded the London Court of Bankruptcy from the High Court; and it was held in *Ex parte Ditton* (13) that the right of the London Bankruptcy Court to restrain proceedings in the High Court rested on that fact. But since that date the Bankruptcy Act of 1883 (46 & 47 Vict. c. 52) has come into operation, and of this Act, section 102 corresponds with section 72 of the Bankruptcy Act of 1869.

Before, however, the power of restraining by injunction can be exercised, something must be sought for in the Act of 1883 which corresponds with section 66 of the Act of 1869; whereas it appears that section 100 falls short of section 66 of the earlier Act, for by section 100 of the Act of 1883 the County Court has all the powers and jurisdiction of the High Court, and not of the Court of Chancery. The powers of the High Court are, as has been seen, limited by the Judicature Act, 1873, s. 24, sub-s. 5, so that the power of restraining by injunction proceedings in the High Court has disappeared, and I think that the Bankruptcy Act of 1883 does not confer on the County Court Judge the powers which he would have had were the Act of 1869 still in force. The County Court Judge was right in the view he took of his jurisdiction, and on the question of discretion I concur with what the Master of the Rolls has said.

BOWEN, L.J.—The Queen's Bench Division has, as I think, made a mistake in overruling the discretion which has here been exercised by the County Court Judge. I may say that I do not think such a discretion should be lightly overruled, as the matter was one peculiarly for him to judge whether or not it should be dealt with there or in the High Court. The Divisional Court has, however, decided that an injunction to restrain an action in the High Court may issue from the County Court sitting as a Court of Bankruptcy, when it raises a question of the same na-

ture as that raised in the County Court. I am unable to agree in this view of the law. Judges of County Courts could do this under the Act of 1869, because under that Act they had the powers of a Judge of the Court of Chancery, and these powers they derived from a combination of sections 66 and 72. All the injunctions granted under the Act of 1869 were issued by the London Court of Bankruptcy and by the County Courts under the powers conferred by 32 & 33 Vict. c. 71. ss. 65, 66, and 72. Cases have been relied on to shew sections 65 and 66 were not really the sections which gave that power, but the cases cited do not establish that position. The question in those cases was whether the subject-matter was within the jurisdiction of the Court as a Court of Bankruptcy, and section 72 was referred to in each case to decide that point. When the subject-matter was such as to satisfy the requirements of section 72, then it was held that sections 66 and 72 applied so as to enable the Court to enforce the jurisdiction by restraining an action in the High Court.

The Act of 1883 does not contain those sections, although section 102 corresponds with section 72 of the Act of 1869, and, like it, defines the class of questions which falls within the jurisdiction of the County Court as a Court of Bankruptcy. But there is no section which exactly corresponds with section 66. The London Court of Bankruptcy has admittedly no such power, and no division of the High Court can restrain an action in another division; but it was said that section 100 of the Act of 1883 gave County Courts as Courts of Bankruptcy the power claimed by the respondent. For it was said that the words in section 100, "ordinary powers of the Court," gave or preserved the power, inasmuch as the interpretation clause says that the word "Court" includes "County Court"; but section 168 says, "In this Act, unless the context otherwise requires, 'the Court' means the Court having jurisdiction in Bankruptcy under this Act"; and it seems to me that if section 100 be read, the result is that the context and the sense shew that "the Court" means the County Court. It was further argued that the words in section 100, "powers and jurisdiction" of the High Court, gave or preserved this power of restraining by injunction; but the powers and jurisdiction of the High Court do not include that power; so that on both grounds the argument for the respondent fails.

If there be a danger of conflict between the County Courts and the High Court, still that can always be avoided by an application in the High Court to stay an action there until the County Court Judge sitting in Bankruptcy has discharged his functions, or by an application to him to stay the proceedings in the County Court until the point has been decided in the High Court.

Appeal allowed.

Solicitors—Scott & Barham, for appellants; John Edward Fox, for respondent.

[IN THE COURT OF APPEAL.]

1885. Feb. 26. } HALLAS *v.* ROBINSON.*

Bill of Sale—After-acquired Property—Equitable Title—Subsequent Bill of Sale—Legal Title—Possession taken by Grantee of Equitable Title.

A bill of sale assigning property to be afterwards acquired confers only an equitable title on the grantee, who cannot, by taking possession under the bill of sale, oust a legal title which has been acquired without notice of the bill of sale and before possession has been taken by the grantee.

Joseph *v.* Lyons (*ante*, p. 1) *followed.*

Appeal by the plaintiff from a judgment of Butt, J., after trial without a jury.

In September, 1875, one Joseph Robinson assigned by bill of sale to Mary Mitchell, to secure an advance of 250*l.*, all the goods and chattels then being upon certain premises, and also all other goods and chattels which should afterwards be in or upon the same premises. The bill

* *Coram* Brett, M.R., Baggallay, L.J., and Lindley, L.J.

of sale was duly registered, but was never re-registered. In February, 1882, Robinson applied to the plaintiff for an advance, and gave him a bill of sale on all the goods and chattels then being on the same premises.

In 1884, the grantor having fallen into arrear in the payment of the instalments, and a balance of 68*l.* being due, the plaintiff attempted to take possession under his bill of sale, but found the defendant in possession, who claimed the goods as assignee of the bill of sale given by Robinson to Mary Mitchell.

The plaintiff, after a demand and refusal, brought this action to recover the goods comprised in his bill of sale, and at the trial it was proved that part of the goods claimed by the plaintiff had been purchased and brought upon the premises after the execution of the bill of sale in 1875.

Butt, J., gave judgment for the defendant.

The plaintiff appealed.

Forbes, *Q.C.*, and *R. Wallace*, for the plaintiff.—The plaintiff had the legal title, whereas the defendant had only an equitable title to the after-acquired goods—*Joseph* v. *Lyons* (1). If nothing had intervened, the defendant on taking possession would have become the legal owner of the goods, but he only took possession after the plaintiff had acquired a legal title. *Balding* v. *Read* (2) and *Lazarus* v. *Andrade* (3) were also cited.

Macmorran (with him *Bigham*, *Q.C.*), for the defendant.—If the plaintiff had managed to take possession the defendant would have been in the same position as the plaintiff in *Joseph* v. *Lyons* (1). But he did not do so, and therefore the two cases materially differ. The right which the defendant had to take possession, coupled with the fact that he did subsequently take possession, ought to prevail against the plaintiff's right, for the taking possession has relation to the right to take possession. *Clements* v. *Matthews* (4) was also cited.

Forbes, *Q.C.*, replied.

BRETT, M.R.—We are not really called upon to overrule the decision of Mr. Justice Butt, because at the time of his decision the case of *Joseph* v. *Lyons* (1) had not come before this Court. The defendant took a bill of sale, which is sufficiently specific, and gave him the right, in case the conditions in the bill of sale were not fulfilled, to take possession of after-acquired property which had come upon the premises mentioned in the bill of sale. It has, however, been held in *Joseph* v. *Lyons* (1) that that would only give him an equitable title to the goods; but it also gave him the right, on failure of the condition, to take possession of the goods, and if nothing else happened, and he did take possession, he would have a legal title in the after-acquired goods then upon the premises, in which up to that time he would have had only an equitable title. But whilst he had only that equitable title, and after property had been brought upon the premises, the grantor gave a bill of sale to the plaintiff of the property then upon the premises, the effect of which, it was urged, only gave him a legal title to the goods subject to the equitable title of the defendant. I think that is true. But whilst the defendant had an equitable title the plaintiff had also a legal title to the goods, which could not, after such title had vested in him, be ousted by reason of the defendant taking possession. The defendant is therefore in the same position as a person would be who had bought and paid for goods which are in the possession of a man who has already parted with his property in them to some one else, and who therefore commits a fraud; but the person upon whom the fraud is committed must suffer. I doubt whether an action could be maintained without a demand being made by the plaintiff, for the defendant was in perfect lawful possession of the goods; but after such demand had been made the defendant was bound to enquire into the title. I therefore think that, as

(1) *Ante*, p. 1.
(2) 3 Hurl. & C. 955; 34 Law J. Rep. Exch. 212.
(3) 49 Law J. Rep. C.P. 847; Law Rep. 5 C.P. D. 318.
(4) 52 Law J. Rep. Q.B. 772; Law Rep. 11 Q.B. D. 808.

there was a demand and refusal here, there was a conversion of the goods by the defendant, and the plaintiff can maintain the action.

BAGGALLAY, L.J.—I am of the same opinion. I think this case is governed by *Joseph* v. *Lyons* (1), for although it is the converse of that case as regards the interest of the parties, the circumstances are the same. So far as the bill of sale given in 1875 purported to assign all the goods which might be brought into and upon the premises, it created an equitable interest, which, but for the right of any other person intervening, would have become a legal interest on the grantee taking possession. But there was such an intervention; for the grantor gave a bill of sale to the plaintiff of the goods then in his actual possession, and which had been acquired between the date of the bill of sale given to Mitchell and that given to the plaintiff. The plaintiff therefore, by the grant of that bill of sale, had acquired a legal title to those goods. Thus far the case is governed by *Joseph* v. *Lyons* (1); but in addition, when the plaintiff sought to take possession, he found the defendant had done so under an assignment of the bill of sale which had been given to Mitchell. The mere taking possession, which if taken at a time when no other person had a legal title would have been a good possession, cannot deprive a person of his legal title.

Regarding these parties as innocent persons, the better title must prevail, and judgment must therefore be entered for the plaintiff.

LINDLEY, L.J.—The simplest way to solve this question is to see how the title stood after February, 1882. Joseph Robinson had in 1875 assigned to one Mitchell, so as to pass the legal title, certain goods and chattels then being upon his premises, and he also assigned all other goods and chattels belonging to him which should thereafter be brought upon the same premises. In February, 1882, he assigned the after-acquired goods to the plaintiff by deed in such a way as to pass the legal title in the after-acquired property to the plaintiff, but without notice of Mitchell's equitable interest. The legal title of the plaintiff was complete, and, after a demand and refusal, he could have recovered possession of the goods at law. But it was said that the defendant, having acquired by deed the right to take possession, and having taken possession in 1884, such possession had displaced the plaintiff's legal title. The defendant's title, however, had been acquired under a deed of assignment from Mitchell, who had nothing more than an equitable title.

The possession taken by the defendant in 1884 is to be referred to the agreement contained in the deed of 1875, and, if nothing had happened in the interval, he would have acquired a legal title as against the mortgagor. He had, however, only an equitable title, and there is nothing to displace the legal title which the plaintiff acquired in 1882. The principle upon which *Joseph* v. *Lyons* (1) was decided is therefore applicable.

Appeal allowed.

Solicitors—Burn & Berridge, agents for Hunter & Macmaster, Bradford, for plaintiff; Hamlin, Grammer & Hamlin, agents for B. C. Pullan, Leeds, for defendant.

[IN THE COURT OF APPEAL.]

1885. April 22. } SMITH *v.* CRITCHFIELD AND OTHERS. (JENNER *claimant.*)*

Sheriff—Interpleader—Money paid without a Levy—Trespass by Sheriff—Protection to Sheriff—Rules of Court, 1883, *Order LVII. rule* 16.

A sheriff's officer went in execution of a warrant of fi. fa. to a shop which was stated to be the residence of the judgment debtor. It turned out that the judgment debtor was only an assistant in the shop, that he had no goods there, and that he lived elsewhere. The sheriff's officer went to an address given to him by J., the occupier of the shop and the owner of the goods in it; but he found that the debtor was not then living there. The officer re-

Coram Brett, M.R., Baggallay, L.J., and Bowen, L.J.

turned to the shop and seized the goods in it, putting a man in possession. J. then paid under protest the amount of the judgment debt and expenses.

The sheriff having received the money took out an interpleader summons:—

Held (*affirming the judgment of the Queen's Bench Division*), *that an interpleader issue could be directed; that the money paid under protest was the "proceeds or value" of goods "taken or intended to be taken in execution" within Order LVII. rule* 1 (*b*).

Held also, *that, in the circumstances of the case, the sheriff ought to be protected from any action for seizing the goods of J., and also from any action for trespass in entering J.'s shop in order to seize them, inasmuch as J. had suffered no real grievance beyond the seizure of the goods.*

Winter *v.* Bartholomew (11 Exch. Rep. 704; 25 Law J. Rep. Exch. 62) *approved.*

Appeal by Jenner, the claimant in an interpleader summons, from the judgment of the Queen's Bench Division referring an interpleader summons back to chambers.

A judgment having been obtained by Critchfield against Smith for a sum of 9*l.* 3*s.* 6*d.*, a writ of *fi. fa.* was delivered to the sheriff of Sussex directing him to levy the amount of the judgment debt on the goods of Smith, whose address was given at Robertson Street, Hastings. The sheriff's officer went to that address and expressed his intention of seizing the goods there. Smith was a shopman in the employ of Jenner, to whom the shop and all the goods in it belonged. Jenner informed the sheriff's officer of this, also informing him that Smith lived at another address, which he gave him. The sheriff's officer went to that address, but it turned out that Smith was not then living there; so he returned to the shop in Robertson Street, seized the goods in it, and put a man in possession, who remained in the room at the back of the shop for part of the day, when Jenner paid under protest the sum claimed and expenses, amounting in all to 9*l.* 12*s.* 4*d.*, and gave the sheriff notice of that fact, and of his intention to bring an action against him. After the first visit of the officer to the shop he sent a message to the sheriff to the effect that he was sure there was a mistake.

The sheriff, having received the money so paid under protest, took out an interpleader summons. The Master refused to direct an issue, but the Judge at chambers and the Divisional Court referred the matter back to the Master.

Jenner appealed.

Jelf, Q.C., and *Safford*, for the appellant.—No interpleader issue can be directed in this case. The facts do not bring the case within the purview of Order LVII. rule 1 (*b*) (1).

No interpleader issue can be directed when the sheriff has been paid out under protest. The money paid in such a case is not money taken in execution; nor is it the proceeds or value of any goods taken in execution under process; nor does it represent the goods seized. Interpleader is confined to those cases in which the Court has a hold over the goods.

[BOWEN, L.J.—Does not *Bissicks* v. *The Bath Colliery Company* (*Limited*) (2) militate against this contention?]

In that case it was held that there had virtually been a levy, and in substance an

(1) Order LVII. rule 1: "Relief by way of interpleader may be granted—

"(*a*) Where the person seeking relief (in this order called the applicant) is under liability for any debt, money, goods, or chattels for or in respect of which he is or expects to be sued by two or more parties (in this order called the claimants) making adverse claims thereto;

"(*b*) Where the applicant is a sheriff or other officer charged with the execution of process by or under the authority of the High Court, and claim is made to any money, goods, or chattels taken or intended to be taken in execution under any process, or to the proceeds or value of any such goods or chattels, by any person other than the person against whom the process issued."

Rule 2: "The applicant must satisfy the Court or a Judge by affidavit or otherwise—

"(*a*) That the applicant claims no interest in the subject-matter in dispute other than for charges or costs; and

"(*b*) That the applicant does not collude with any of the claimants; and

"(*c*) That the applicant is willing to pay or transfer the subject-matter into Court, or to dispose of it as the Court or a Judge may direct."

(2) 46 Law J. Rep. Q.B. 611; Law Rep. 2 Ex. D. 459.

actual levy; so that the decision does not apply to the facts of this case.

Even if an interpleader issue can be directed, the sheriff ought not to be protected from an action, for there is in this case evidence of collusion between him and the judgment creditor; and as he is liable to an action for the recovery of the money paid and for damages for trespass, he has an interest in the money paid; so that on that ground also he ought not to be protected. In this case the sheriff committed a trespass by entering the shop, over and above that which he committed in seizing the goods; so he ought not to be protected from an action against him in respect of that trespass—*Hollier* v. *Laurie* (3).

[BOWEN, L.J.—Does not *Winter* v. *Bartholomew* (4) decide this point against the appellant?]

At the most that case decides that the Court will consider whether there is or is not a real grievance; and the facts of this case establish a real substantial definite grievance arising from the seizure of the goods in Jenner's shop during the hours of business.

Crump v. *Day* (5) was referred to.

[BRETT, M.R.—It is suggested that where a sheriff enters, as he has done here, and seizes goods which turn out not to be the goods of the execution debtor, the Court is entitled to protect him in respect of the seizure of the goods, but not in respect of his entry to seize—that is, the entry without which he could not seize, unless, perchance, the goods were in the street. Can that be the law?]

Cock, for the sheriff.—*Winter* v. *Bartholomew* (4) states plainly that the sheriff can be protected, and that there are not in such a case as this two actions for trespass, but that there is only one action. Order LVII. rule 15 enables the Court to make in an interpleader proceeding "all such orders as to costs and all other matters as may be just and reasonable."

E. Pollock, for Critchfield, did not argue.

Jelf, Q.C., in reply.

(3) 3 Com. B. Rep. 334; 15 Law J. Rep. C.P. 294.

(4) 11 Exch. Rep. 704; 25 Law J. Rep. Exch. 62.

(5) 4 Com. B. Rep. 760.

BRETT, M.R.—In this case a judgment creditor delivered a writ of *fi. fa.* to the sheriff in order that he might levy the amount of the debt on the goods of the judgment debtor, who appears to have been at that time an assistant in the shop of Jenner, the claimant. The sheriff's officer went to that shop; he used no violence, he did nothing which it would not have been his duty to do had the goods in the shop belonged to the judgment debtor, and had he lived there. It seems that the officer was told by Jenner that the judgment debtor did not live there, and an address was given to him as being that of the debtor; he went there, but found that the debtor did not live at that address. He then returned to Jenner's shop, and seized the goods there, or some of them, to satisfy the debt. It is said that the officer sent a message to the effect that he was sure there was a mistake, and reliance is placed by the appellant on this fact; but it seems to me that this message did not mean that he knew there was a mistake, but only that there was some difficulty and doubt, and it was a message of caution. Jenner thereupon claimed the goods, and in order to prevent their being seized, he paid, after the officer had been in possession for a short time, the judgment debt and expenses, amounting to 9*l.* 12*s.* 4*d.* Jenner paid this sum under protest; he still claimed the goods, and he protested that the money which the officer intended to realise by the sale of the goods seized was his money, inasmuch as the goods were his; and with this strong protest he paid the money.

This being so, the sheriff says that he has the money, that he does not know to whom it belongs, that he has no interest in it, and that two parties claim it, and he consequently asks that an interpleader issue may be directed. On this, it is argued on behalf of Jenner that the Judge or the Master at chambers has no jurisdiction to direct an interpleader issue, and it is urged that the money paid under protest does not come within the meaning of Order LVII. rule 1 (*b*) (1). It is said that the money so paid is not "money, goods, or chattels taken or intended to be taken in execution under any process," or

"the proceeds or value of any such goods or chattels." I am unable to agree with that argument. The execution creditor claims the money paid under protest, so that his claim may be considered to be a claim to that money as money taken in execution under the process, for it is certainly taken by virtue of the process. But even if this be not so, still the money paid and received is the proceeds of the goods or chattels; they were seized in order to produce the money. The usual way, no doubt, of realising money is to have a sale by auction, with all its attendant expenses; but because in this case the money was paid without a sale, it is none the less the proceeds of the goods seized—it is paid for and as representing the goods; so that, in my opinion, the objection taken is invalid and cannot prevail. If it were valid, the result would be that in all cases a sheriff must sell the goods even when there is a less expensive way of realising the amount claimed—that is, by receiving it when offered and paid under protest. It has been suggested that in this case there was collusion between the sheriff and the judgment debtor. I can see none, and I do not think that suggestion need be further answered.

This appeal, therefore, fails; but it was then argued for some time on behalf of the appellant that the Court ought to direct the Master, to whom the matter must be referred, to omit from the issue any direction by way of protection to the sheriff; but at the conclusion of the argument it was said that this contention would be withdrawn. I am of opinion that such a course cannot now be taken. It is true that we cannot on this occasion give a binding judgment on that question; but in my opinion it would be dangerous were we in any way to countenance the view that where an interpleader summons is taken out, and the question arises whether the sheriff ought to be protected because he has committed a legal wrong, such a matter is not the subject of an interpleader order. But for the fact that a legal wrong has been committed, no protection is needed. If the sheriff has made a perfectly innocent mistake, still he has done that which amounts to a legal wrong, and in such a case the Judge or Master making the interpleader order is entitled to protect him from the legal consequences of the illegal act which has been done under the *fi. fa.* But it is urged that in such a case as this, where the sheriff has by his officer entered a house which is not the house of the debtor, and has seized there goods which are not the goods of the debtor, he has done two illegal acts, and that even if he is to be protected from the consequences of one of those acts, he ought not to be protected against the results of the other. But these two acts, as they have been called, are really one simultaneous illegal act. How idle it would be to protect the sheriff against the consequences of his illegal seizure of goods, and then to allow an action to be brought against him because he entered the room and crossed the floor to seize them? If the goods seized are anywhere else than in a street or open place, the sheriff must enter to seize them. The act is really one act; and he has, in legal phraseology, broken and entered a house in order to seize the goods, and it is in respect of this one act which he does under the writ of *fi. fa.* that he seeks for protection.

I think there is clear authority on this question, and that *Winter* v. *Bartholomew* (4) lays down the law in plain terms. The Lord Chief Baron said that the case of *Hollier* v. *Laurie* (3) was "no authority to prevent us from staying the proceedings in an action against the sheriff where there is no real grievance beyond that of the seizure of the goods." And Baron Martin says, "In truth there is but one right of action;" and again, "If indeed the sheriff in the execution of the writ has committed any real grievance, the Court will allow the injured party to bring the action." This means a real legal substantial grievance; it cannot mean that there can be no protection given to the sheriff unless he has found and seized the goods in the open street or in some open place.

It has hardly been doubted that there is jurisdiction to protect the sheriff when an interpleader order is made in circumstances such as exist here; if it were otherwise, the protection would be in many cases abortive, and the sheriff would then be

liable to have an action brought against him for nominal damages, which must be an undefended action. As, however, I am of opinion that the argument cannot prevail, this appeal must be dismissed, and this matter must be referred to chambers.

BAGGALLAY, L.J.—I am of the same opinion. I do not agree with the suggestion that there is no jurisdiction to make an interpleader order when the circumstances are such as exist in this case. I think the provisions of sub-section *b* of Order LVII. rule 1 (1) include such a case as this, and I agree with the view expressed by the Master of the Rolls. It has further been argued on behalf of the appellant that the Court ought to express an opinion that the law does not allow protection to be given to a sheriff in such a case as this, or that, even if the law does permit that to be done, still that the circumstances of this case do not entitle the sheriff to protection. An attempt was made to retreat from that position, but I think we ought to express our opinion that, on the facts as they are at present before the Court, the sheriff ought in this case to be protected from having any action brought against him.

BOWEN, L.J.—I have come to the same conclusion. It has been said that no interpleader can be directed in this case, and that, even if an issue can be directed, still the sheriff ought not to be protected from an action. *Bissicks* v. *The Bath Colliery Company* (2) decided that where the debtor paid the sum demanded in a warrant, there had been in substance a levy, and that the sheriff was entitled to poundage, though there had been in fact no sale.

It is not necessary to decide whether this money was money then taken in execution, for it is at all events the proceeds of the goods seized: it is those goods and the seizure of them which produced this money; so that it is the subject of interpleader, regard being had to the provisions of Order LVII.

The argument then took this course: it was said the sheriff ought not to be protected from an action as he had committed a trespass by entering the house to seize the goods, and that from the consequences of that trespass there could be no protection; but I think the law has been laid down in *Winter* v. *Bartholomew* (4), and that that case shews that the Court can do more than merely stay an action for trespass by the sheriff to goods—for it seems to me that to confine the protection to that part of the trespass would be ineffective.

The real grievance is the seizure of the goods; the trespass in entering to seize them is only nominal, and in consequence the Court will stay the nominal action which might lie for the bare entry where there has been no real or substantial grievance beyond the seizure of the goods. The judgments of the Lord Chief Baron, of Baron Alderson, and of Baron Martin establish this; and although on the facts the case of *Hollier* v. *Laurie* (3) may be distinguished, still, so far as it cannot be distinguished, I think the case of *Winter* v. *Bartholomew* (2) displaces it. On the facts of the present case as they now appear before us, it seems to me that there is no real grievance beyond the seizure of the goods, and that an action for trespass by entering the shop of Jenner could only result in shadowy damages; so that the Master will be justified in protecting the sheriff from any action at all.

Appeal dismissed.

Solicitors—Tippetts & Son, agents for C. Chambers, Hastings, for claimant; Palmer & Bull, for sheriff; Angell, Imbert, Terry & Co., for other parties.

1884. Nov. 24.

THE QUEEN *v.* CLARK.

Vagrant Acts—"Frequenting"—"With Intent to commit Felony"—5 *Geo.* 4. *c.* 83. *s.* 4—34 *&* 35 *Vict. c.* 112. *s.* 15.

[For the report of the above case, see 54 Law J. Rep. M.C. 66.]

1884. Nov. 25. } AGNEW AND OTHERS *v.* USHER AND OTHERS.

Practice—Service of Writ out of Jurisdiction—Action for Rent—Order XI. rule 1 (*b*) (*e*)*—Defendant domiciled in Scotland.*

The writ of summons in an action for the recovery of rent due under a lease of premises situate within the jurisdiction may not be served on a defendant domiciled in Scotland, because the action is one within Order XI. rule 1 (*e*), *in which case service of the writ may not be allowed on a defendant domiciled or ordinarily resident in Scotland or Ireland.*

Application to set aside service of the writ of summons referred by the Judge at chambers to the Court.

The action was for recovery of rent. The defendants carried on business and were domiciled in Scotland, and the plaintiffs had served a writ on them, specially indorsed with a claim by the plaintiffs, as executors of Agnew, for a quarter's rent due on premises situate in Liverpool which Agnew had demised to one Nark by indenture of the 2nd of December, 1881. Nark had assigned to the defendants by indenture of the 10th of July, 1884.

French, for the defendants.—The Court has no jurisdiction to allow service of the writ in Scotland. The action is founded on a breach of a contract to be performed within the jurisdiction; but by the terms of Order XI. rule 1 (*e*) (1) the service out of the jurisdiction may not be allowed when the defendant is domiciled in Scotland or Ireland.

J. G. Barnes, for the plaintiffs.—The cause of action is a contract or liability affecting land within the jurisdiction, and is therefore within the terms of Order XI. rule 1 (*b*): consequently service of the writ out of the jurisdiction may be allowed. Clause (*e*) relates to contracts other than those affecting lands, such as mercantile contracts. The policy of the legislation is to separate land from other contracts, because in the former case it is reasonable that the action should be brought in the country in which the land is situate, and where consequently the law which governs the subject-matter prevails. This action is brought not on a contract strictly so called, but on a covenant in a lease, and depends upon English law, which probably the Scotch Courts would not recognise. The various clauses of rule 1 must be read separately, otherwise rule 2 has no effect —*Lenders* v. *Anderson* (2).

LORD COLERIDGE, C.J.—I do not affect to give judgment in this case with unhesitating confidence. It is quite conceivable that a contract which is within the terms of clause (*b*) may at the same time be within the terms of clause (*e*). I do not say that the present cause of action is exclusively within clause (*e*), because it might be one within (*b*) as well; but on the best consideration I can give to these clauses it appears to me that clause (*b*) must be stretched so as to include such a contract as the one before us, whereas no such operation is necessary to bring it within clause (*e*). Order XI. rule 1 allows service of the jurisdiction whenever, as in clause (*a*), "the subject-matter of the action is land situate within the jurisdiction," and there is good reason why, where the *status* or actual possession of land in England is the subject of litigation, the general rule by which the *forum* of the defendant is to be sought for relief should not prevail. For the same reason the reasonable construction of clause (*b*) is to limit it to any legal proceeding in which the English law governs the *status* or actual possession of land; in such case the

(1) Order XI. rule 1: "Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the Court or a Judge whenever—

"(*a*) The whole subject-matter of the action is land situate within the jurisdiction (with or without rents or profits); or

"(*b*) Any act, deed, will, contract, obligation, or liability affecting land or hereditaments situate within the jurisdiction, is sought to be construed, rectified, set aside, or enforced in the action; or

"(*c*) The action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction, unless the defendant is domiciled or ordinarily resident in Scotland or Ireland."

(2) 53 Law J. Rep. Q.B. 104; Law Rep. 12 Q.B. D. 50.

English *forum* is to be sought. Without pretending to give an exhaustive account of all the proceedings affecting land which would come within clause (*b*), it appears to me that the present action for the recovery of rent does not come within the terms of that clause, but that, according to the ordinary rules of legal phraseology, it is "a breach or alleged breach within the jurisdiction of a contract, which, according to the terms thereof, ought to be performed within the jurisdiction" within the meaning of clause (*c*). In that case, by the latter part of that clause, service out of the jurisdiction may not be allowed on a defendant domiciled or ordinarily resident in Scotland. If I found I could give no adequate interpretation to clause (*b*) without including an action for rent, I would include such an action; but I do not feel myself forced to do so, because there are found words in clause (*c*) which exactly describe the contract sought to be enforced in the present instance. Supposing the action was brought against a man who in the same instrument as that by which the premises were demised had guaranteed the payment of the rent, such a guarantee would surely be as much "an act, deed, will, contract, obligation, or liability affecting land or hereditaments," within the meaning of clause (*b*), as in an action against the person originally liable; but although in substance the actions would be precisely the same, yet it could hardly be argued that the former case was within clause (*b*). The present claim is clearly within clause (*c*), and within the mischief intended to be met by that clause, and the plaintiff must, in accordance with the ordinary rule, follow the *forum* of the defendant.

MATHEW, J.—I am of the same opinion.

SMITH, J.—I have felt some difficulty on the point before us, but I have come to the conclusion that the present claim is within clause (*c*). I would like to add a reason which inclines me to think that the case does not fall within clause (*b*), and on which I should prefer to found my judgment, and that is that the latter part of clause (*b*) seems to exclude the form of the present action. The clause is limited to those cases where the contract, &c., "is sought to be construed, rectified, set aside, or enforced in the action." The plaintiff does not here seek to construe, rectify, set aside, or enforce (which I understand to mean enforce specific performance) the contract, and consequently the present claim is not within clause (*b*).

Writ set aside.

Solicitors—Field, Roscoe & Co., agents for Bateson & Co., Liverpool, for plaintiffs; W. W. Wynne & Son, agents for Evans, Lockett & Co., Liverpool, for defendants.

[IN THE COURT OF APPEAL.]

BANKRUPTCY.
1885.
April 25, 27.
May 8.

In re PARKER; *ex parte* THE BOARD OF TRADE.*

Bankruptcy — Adjudication against Debtor — Official Receiver as Trustee — Power of, to sell Property of Debtor — Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 9, 10, 20, 54, 56, 66, *and* 70.

An official receiver who is by section 54 *of the Bankruptcy Act*, 1883, *the trustee for the purposes of that Act until a trustee is appointed, has power, after an adjudication in bankruptcy has been made against a debtor, to exercise the powers given by section* 56 *to the trustee, so that he can sell the property of the bankrupt.*

Judgment of CAVE, J., *reversed.*

Appeal from the judgment of Cave, J.

On the 6th of March, 1884, a bankruptcy petition was presented against F. & W. Parker, who were partners as solicitors, and on the 13th of March a receiving order was made. On the 15th of March the official receiver appointed Turquand and Whinney special managers of the joint estate of the debtors. On the 20th of March the debtors were adjudicated bankrupts. On the 2nd and 7th of April the furniture and effects of the debtors were sold by auction by direction of the official receiver, and realised over 5,000*l.* The costs and expenses payable out of the bankrupts' estates in respect of this sale amounted to 841*l.* 15*s.* 1*d.*, of which 335*l.* 0*s.* 7*d.* represented the fees and percentage receivable by the Board of Trade from the official receiver under the scale made pursuant to

* *Coram* Brett, M.R., Baggallay, L.J., and Bowen, L.J.

46 & 47 Vict. c. 52. s. 128. On the 18th of April the creditors held their first meeting, when they appointed Turquand and Whinney the trustees in bankruptcy, and a committee of inspection was also appointed. On the 1st of July the trustees applied to the Board of Trade to refund 335*l.* 0*s.* 7*d.*, on the ground that the sales were irregular. This application being refused, the trustees applied to Cave, J., to declare that the sales were unauthorised by the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), that the expenses be disallowed, and that the Board of Trade be ordered to repay to the trustees the percentage obtained by them.

Cave, J., held that the sale by the official receiver was not authorised by the Act, and that the amount of the percentage ought to be returned to the trustees, but he allowed the expenses incurred in the sale.

The Board of Trade appealed.

The Solicitor-General (*Sir F. Herschell, Q.C.*) (*Muir Mackenzie* with him), for the appellant.—The official receiver is by section 54 trustee for the purposes of the Act, and the question is whether section 70 limits his powers. The judgment is based on the assumption that his only duties are defined by that section. But if section 70 operates upon section 54 it must also operate on section 121 as to small bankruptcies; so that the official receiver would have no power of sale in small bankruptcies, and the section would not work.

Linklater (*Charles, Q.C.*, with him), for the trustee.—There are four periods in the bankruptcy—first, receivership pure and simple; second, management from the receiving order to the appointment of the creditors' trustee; third, administration and distribution; fourth, release of creditors' trustee and revival of official receiver's control. The official receiver has no power in the third of these periods. If a sale were necessary the Court might order it.

The official receiver is not a trustee within the meaning of section 56. The context of the group of sections from section 50 to section 57 shews that the trustee spoken of is the trustee appointed by the creditors, for there are things contained in those sections which the official receiver cannot do—as, for instance, he could not apply for the sequestration of a benefice under section 52, inasmuch as he could not produce a certificate of appointment; he could not disclaim under section 55, as the phrase at the end of sub-section 1, "three months after appointment," would not be applicable to him; nor is the provision in sub-section 4 as to the period of twenty-eight days applicable. In section 68, sub-section 4, it is provided that the trustee shall supply the official receiver with information. The words in section 70, sub-section 1 (*a*), "pending the appointment of a trustee," apply to all the clauses of that sub-section save the last. The provision as to remuneration in section 72, and the enactments in section 75 and in section 82, shew that the trustee spoken of in section 56 is not the official receiver. The statute uses different phrases in different parts when speaking of the trustee: it speaks of the trustee for the purposes of this Act (section 54), the trustee under a bankruptcy (section 68): and though it may not be possible to reconcile all these phrases, still the most convenient and complete system is arrived at by construing section 56 so as not to include the official receiver, unless in the case of a vacancy in the office of trustee as specified in section 70, sub-section 1 (*g*).

It has been argued on behalf of the appellant that section 121 presents an insuperable difficulty in the way of the trustees; but that is a distinct enactment, and for the purpose of "small bankruptcies" it modifies the Act, it introduces yet another phrase, and constitutes the official receiver the "trustee in the bankruptcy" unless a special resolution is passed.

The Solicitor-General, in reply.—Section 54 enacts in plain terms that until a trustee is appointed the official receiver shall be the trustee for the purposes of this Act. The expression "under a bankruptcy" in section 68, sub-section 3, means in a bankruptcy. Section 70 does not cut down the powers of the official receiver, it deals with his duties in a variety of circumstances, while sub-section 2 explains his position under that section, not interfering at all with the powers given to him by other parts of the Act. The modifications prescribed by section 121 do not apply until the ad-

judication, and if section 70 limits his powers in the case of a large bankruptcy, it does so equally in the case of a small bankruptcy.

Cur. adv. vult.

BRETT, M.R. (on May 8).—It is not denied that the sale of the goods which was effected by the official receiver while he was acting as trustee was beneficial to the estate, and that it was adopted by the creditors' trustees when they were appointed; but it appears that objection was taken to the percentage which has to be paid to the Board of Trade in consequence of this sale, and therefore the important question of the power of the official receiver to sell has been raised upon this appeal. It is urged on the one hand that if the official receiver can sell before the creditors' trustee is appointed, there is no check upon him; while on the other hand it is urged that if that argument is to prevail, then the official receiver can have no power to sell until the creditors have appointed a trustee, however important it may be for the benefit of the estate to sell at once.

After a careful consideration of the various sections of the statute, I have come to the conclusion that this appeal must be allowed. I do not propose to go in detail into all the questions which have been raised. My judgment proceeds on a well-known and, as it seems to me, sound rule of construction, that the words of an Act of Parliament must be taken in their plain, ordinary sense, unless the context compels the Court to give them some other meaning. Section 9 of 46 & 47 Vict. c. 52, enacts that, "on the making of a receiving order, an official receiver shall be thereby constituted receiver of the property of the debtor." Now, these official receivers are, as is shewn by section 66, officers and servants of the Board of Trade, and it is one of these officers that section 9 makes the receiver of the debtor's property. Section 20 provides that "where a receiving order is made against a debtor, then," in the circumstances stated in that section, "the Court shall adjudge the debtor bankrupt, and thereupon the property of the bankrupt shall become divisible among his creditors, and shall vest in a trustee." I turn then to section 54, to discover who the trustee is, and I find that "until a trustee is appointed, the official receiver shall be the trustee for the purposes of this Act, and immediately on a debtor being adjudged bankrupt the property of the bankrupt shall vest in the trustee"—that means the creditors' trustee. Section 20 vests the property in "a trustee"; section 54, sub-sections 1, 2, and 3, vests it in "the trustee." Who is the trustee at the time mentioned in section 20? The official receiver is the trustee at that time. The duties and powers of the trustee are pointed out in section 56. The official receiver, therefore, is appointed trustee until a trustee is appointed by the creditors, and the property of the debtor therefore vests in him. Then by section 56 he may, "subject to the provisions of this Act," sell the property of the bankrupt; and there is nothing in that section to shew that the words "the trustee" are limited to some particular trustee—that is, to the trustee appointed by the creditors. It was urged on behalf of the respondent that the Act provides that the official receiver may be a trustee with full powers of a trustee if there is a vacancy in the office of trustee, but not in any other case. To adopt that construction, it seems to me it would be necessary to alter the Act by reading into it a great many sentences. The statute is divided into several parts, and its provisions are classed under distinct headings, and each heading appears to me to be intended to comprise exhaustive provisions as to the matters contained under the heading, so that there is of necessity a certain amount of repetition in the enactments contained under the different headings.

The argument on behalf of the respondent divided bankruptcy proceedings into three stages, and then it was urged that with regard to the first stage it was impossible for the official receiver to be the creditors' trustee. But when it is attempted to make such divisions it not seldom results that the divisions are cross-divisions, and fallacies ensue. I do not think that the fact that the statute may be to some extent tautologous ought to prevent the Court from reading the words of the Act in their ordinary meaning. The argument on behalf of the appellant dwelt much on

the difficulties which would arise in carrying out the provisions of section 121 relating to small bankruptcies, unless the words "the trustee" in section 56 were held to include the official receiver. I do not feel oppressed by that argument, and I do not think it is necessary to give any decision on section 121; but, however that may be, the refusal to adopt that argument does not conclude this case against the appellant. I think that the rule of construction to which I have referred applies to this case, that the provisions of the section are express, that they include the power of sale, and that there is nothing in the statute which entitles us to give any other interpretation than the one I have expressed to the provisions relating to this matter. If the percentage is thought to be too large, there is power in section 128 to prescribe a scale of fees and percentages from time to time.

BAGGALLAY, L.J.—The argument for the appellants divided the proceedings in bankruptcy into three periods, and the contention was that there was a distinction between the powers and the duties of the official receiver and the trustee during those periods. I am of opinion that three periods may be taken, and that the powers and duties of the official receiver and the trustee may be considered with respect to those periods, although I do not feel able to adopt in exact terms the three periods suggested in the argument on behalf of the respondent.

The first period appears to me to last from the presentation of the petition to the making of the receiving order (although this period does not occur in cases in which the petition is presented by the debtor himself). The second period lasts down to the time of adjudication, and the third period until a trustee is appointed by the creditors. The first provision contained in the Act which relates to this matter is found in section 9, which enacts in sub-section 1 that "on the making of a receiving order, an official receiver shall be thereby constituted receiver of the property of the debtor": so that the official receiver becomes thereby a receiver of the property of the bankrupt. Section 10 gives the Court power to "appoint the official receiver to be interim receiver of the property of the debtor," before the receiving order is made. The Court of Chancery was well acquainted with the duties of an interim receiver, who was appointed to act until a full receiver was finally appointed; and it is not unimportant to note the difference between the language of sections 9 and 10 with regard to the position of the official receiver, who is constituted receiver after a receiving order has been made, and the interim receiver, who is appointed before the receiving order is made, and to observe that the phrase "interim receiver" only applies to the official receiver when he is appointed after the presentation of the petition and before the receiving order is made. I now proceed to consider the effect of section 20, which applies to the period after adjudication, and provides that upon adjudication "the property of the bankrupt shall become divisible among his creditors and shall vest in a trustee."

The expression here used is "a trustee," not "the trustee," and section 21 then provides for the appointment of a trustee. It may possibly occur in some rare cases that the creditors may appoint a trustee before the receiving order is made by the Court, and this possibility serves to explain certain phrases used in other parts of the statute. Section 22 provides for the appointment of a committee of inspection. Thus far the provisions of the statute with regard to the appointment of trustees are usually not called into exercise until after the order of adjudication, so that they apply to the period in which no trustee has been appointed; and it is now necessary to turn to sections 54 and 55, which belong to a group of sections all of which come under the general heading "Realisation of property." Section 54, sub-section 1, provides that "until a trustee is appointed, the official receiver shall be the trustee for the purposes of this Act"; that means, I think, that he shall be the trustee for all the purposes of the Act; so that the provision in sub-section 2, that "the property shall forthwith pass to and vest in the trustee appointed," means shall vest in the official receiver as the trustee for all the purposes of the Act, inasmuch as no trustee has at

that time been appointed by the creditors. Sub-section 3 supports this view, for it provides that "the property of the bankrupt shall pass from trustee to trustee, including under that term the official receiver when he fills the office of trustee," which shews that it will pass from the official receiver and vest in the new trustee when he is appointed. It has been suggested that this sub-section only applies to the case of a vacancy in the office of trustee; but I do not think that that construction can be adopted, regard being had to sections 20 and 21. Then section 56 seems to apply to the case of possible vacancy in the office of trustee, and I think that the words there used are large enough to empower the official receiver to do that which he has done in this case, for they are inserted in these sections which come under the head of "Realisation of property," although section 87, sub-section 4, expressly provides that "during any vacancy in the office of trustee the official receiver shall act as trustee"—so that the power would seem to be conferred twice over in this statute. Proceeding now to another group of sections, placed under the title "Official receivers and staff of Board of Trade," it is necessary to consider sections 66 and 71. Section 66 and section 67 provide for the appointment of official receivers and their deputies; section 68, sub-section 1, refers to the duties of the official receiver, and sub-section 3 provides that "all expressions referring to the trustee under a bankruptcy shall, unless the context otherwise requires or the Act otherwise provides, include the official receiver when acting as trustee." Section 69 deals more explicitly with the duties of the official receiver as regards the debtor's conduct, and section 70 with his duties as to the debtor's estate. This section has been relied on by the respondent; but although the phrase "interim receiver" is used in sub-section 1 (*a*), it is not limited as it is in section 10, for it covers a longer period, inasmuch as section 70, sub-section 1 (*a*), empowers the official receiver to act as interim receiver pending the appointment of a trustee. Sub-section 1 (*g*) enables the official receiver to act as trustee during any vacancy in the office of trustee, and the same power is again expressly given in section 87, sub-section 4: so that we again find the same power given twice over in different parts of the Act; but until this period there does not seem to be any express provision for the case of a vacancy.

Reliance was also placed by the respondent on section 70, sub-section 2, and it was urged that the "same powers" mentioned in that clause meant the same powers and no other powers; but it seems to me to be a sub-section which deals not with the powers of the official receiver as a trustee, but merely with that officer as official receiver. So that it does not place any fetter on his powers when he is acting as trustee—and when he is, in fact, the trustee in the bankruptcy—for in my opinion section 70 was not intended to limit his powers as such trustee. With regard to the question of the percentage, I would only say that section 128 enables the Lord Chancellor to prescribe the percentages to be charged.

The counsel for the appellant relied on the provisions of section 121 relating to small bankruptcies, and pointed out certain inconveniences which would ensue were the Act to be construed as suggested by the respondent; and I agree that I think some of the inconveniences pointed out would follow; but I rely rather on the general scope of the Act, and on the definition which it gives of the duties of the official receiver and the trustee, and I agree that this appeal must be allowed.

BOWEN, L.J.—After the careful consideration and exposition of the Act which has been given by the Master of the Rolls and the Lord Justice, I do not think it necessary to add anything, beyond saying that I agree with the judgments which have been delivered.

Appeal allowed (1).

Solicitors—W. Murton, for the Board of Trade; Linklater & Co., for trustees.

(1) The trustees asked for leave to appeal to the House of Lords, and the Court gave leave, on the condition that the sanction of the creditors should first be obtained.

[IN THE COURT OF APPEAL.]

1885. May 16. THE BARROW MUTUAL SHIP INSURANCE COMPANY (LIMITED) *v.* ASHBURNER.*

Ship and Shipping—Insurance—Mutual Insurance—Ships Insured without a Stamped Policy—Estoppel—30 *Vict. c.* 23. *ss.* 7 *and* 9—39 *Vict. c.* 6. *s.* 2.

Where a member of a mutual insurance company, afterwards converted into a limited company, has vessels on its books as insured, and pays calls, and otherwise acts as if he were a member of the company, he is, in any action brought against him by the limited company for calls on losses, estopped from denying his liability and from setting up either any irregularity in the transfer from the one company to the other, or that the losses were paid without any stamped policies being entered into in contravention of 30 *Vict. c.* 23. *s.* 7.

Appeal of the defendant from the judgment of Mathew, J., and Day, J., upon a Special Case stated in an action for the recovery of 342*l.* 5*s.* 3*d.* for calls and interest due to the plaintiff company.

In the year 1858 the Barrow-in-Furness Mutual Ship Insurance Company was registered under 7 & 8 Vict. c. 110 and 10 & 11 Vict. c. 78. The defendant was admitted a member in June, 1868, and insured several vessels, and paid the entrance fees and calls upon them. In all cases except two a policy was issued to the defendant, but in those cases the proposals were approved and the calls and contributions paid by the defendant. After 1878 no policies were issued, and the practice was, in the case of the defendant and other members, after the expiration of the first time policy, to issue no new policy, but to give stamped receipts for calls. The defendant was treasurer of this company.

On the 29th of December, 1880, at a special general meeting of the company, summoned in accordance with the rules, it was resolved that the business and effects be transferred to a limited company, and that the existing company be dissolved.

On the 3rd of February, 1882, the plaintiff company was registered. The defendant at this date ceased to be treasurer, but the business of the old company was carried on in the name of the plaintiff company; and between the passing of the resolution and the registering of the plaintiff company, and after the registering of the plaintiff company, the defendant continued to keep vessels on the books of the company as insured, and to put vessels on and take them off from time to time, and to pay calls, but no policy of insurance was given to him.

The writ in the action was issued on the 29th of July, 1882, and the claim was for three calls, with interest, made respectively on the 21st of September, 1881, and the 25th of January and the 25th of March, 1882. These calls were made to meet actual losses which had happened to vessels whose owners had paid the usual entrance fee, and who had made proposals which were duly accepted, but no policy had been issued for any of these vessels.

By 30 Vict. c. 23. s. 7 it is enacted that "no contract or agreement for sea insurance shall be valid unless the same is expressed in a policy, and every policy shall specify the particular risk or adventure, the names of the subscribers or underwriters, and the sum or sums insured, and in case any of the above-mentioned particulars shall be omitted in any policy, such policy shall be null and void to all intents and purposes."

By section 9, "No policy shall be pleaded or given in evidence in any Court, or admitted in any Court to be good or available in law or in equity, unless duly stamped, and it shall not be lawful for the said commissioners or any officer of inland revenue to stamp any policy at any time after it is signed or underwritten by any person, on any pretence whatever," with two immaterial exceptions.

By section 13 a penalty of 100*l.* is imposed on any person becoming an assurer unless the insurance is in writing and duly stamped.

By 39 Vict. c. 6 it is enacted that "from and after the passing of this Act, section 16 of the Stamp Act, 1870, shall apply to a policy of sea insurance. Such policy shall, for the purpose of the said section, be an instrument which may legally be stamped after the execution thereof, and

* *Coram* Brett, M.R., Baggallay, L.J., and Bowen, L.J.

the penalty payable by law on stamping the same as aforesaid shall be the sum of 100*l.*"

Bigham, Q.C., and *R. Neville*, for the defendant.—The sums to which the defendant is asked to contribute were paid on contracts prohibited by the statute. It does not matter whether the forbidden act is *malum prohibitum* or *malum in se*. The Act says that "no contract for sea insurance shall be valid" in the circumstances present in this case. By section 13 a penalty is imposed on insuring unless the policy is stamped, and by section 14 on the assured. The Act of 1876 does not affect the previous Act in this respect. There can be no estoppel in the face of the statute.

H. Collins, Q.C., and *K. Digby*, for the plaintiffs.—The defendant is estopped from saying that the plaintiffs ought not to have paid these losses. Their paying them without a stamped policy was not a crime. *Fieri non debuit factum valet.* The defendant was himself insured in the same way. He has induced members to join the company and incur expenses on the representation that he was a member. They cited *Thacker* v. *Hardy* (1).

BRETT, M.R.—I must first express my pleasure at the ability and tact with which the case has been argued by the counsel on both sides, and I must then express my absolute abhorrence of the defence, which is a mean and disgraceful attempt to back out of a liability, but which I am happy to say is wholly unsuccessful. The defendant was an active member of two mutual insurance companies, the business of which was carried over from the one to the other somewhat irregularly. First of all, the old company was established, and secondly, it was resolved to turn it into a limited mutual insurance company. Whatever may have been the intention of those who drew the resolution, I think the effect of it is that the old society existed until the new society was registered. The new society was formed and registered, and the defendant assumed to be a member of it on the terms that ships were to be insured against losses: and if his ship were lost, the others should pay him, but if the ship of one of the others were lost, he and the rest should pay him. That is always the substance of these contracts. The members really make contracts with one another, but the society is the machinery for collecting the calls and paying the losses. He acted as if the other persons had validly insured their ships. When it seemed to his advantage he put ships into the society, and when it seemed to his advantage he took them off. It is said that he did not know the course of business in these societies, or that when the policies were renewed there was an unstamped receipt given. That assertion is not supported, and, in my opinion, he knew the mode in which this business was being carried on. After he had induced the other members to belong to the society on the faith that he would pay for losses, losses in fact occur, and a call is made. He knew that the ships were insured on renewal without a stamp. The call is made, and notice sent to him, when he writes as if accepting the calls as valid. Thereupon the society —namely, the other members—settle the losses. They make the calculations, collect the contributions from other members, and pay upon the losses. The other members entered into the insurance in the faith that he would pay, but he misled both those who paid calls and those who received for losses, as well as the society representing the members. In such a condition of things he is estopped from saying that the calls were improperly made or losses improperly paid. If the estoppel set up was against a criminal or prohibited contract, there would be no estoppel. The sections referred to occur in Stamp Acts which require stamps to be put on certain documents. They assume the existence of a contract of insurance, and what is aimed at is that if they are not stamped certain advantages or alternative advantages accrue to the revenue. It was not an offence at common law not to affix a stamp; and when the Legislature requires a writing and a stamp, it imposes an obligation to do something which there is no obligation to do at common law. The consequences of not doing it are a novelty invented by the Legislature. In the same statute in which the obligation is

(1) 48 Law J. Rep. Q.B. 289; Law Rep. 4 Q.B. D. 685.

imposed the consequences of disobedience are enacted. I am of opinion that under those circumstances the only consequences are those expressly enacted. It is not true that there could be an indictment in respect of this obligation. That is the construction of the first statute, and the subsequent statute is fatal to the contention that there is a crime, because the officer of the Court may put a stamp on the document on payment of a penalty. The statute says that when this so-called prohibited thing is brought into Court, it may be stamped, and becomes a valid document. That shews that the Legislature thought that the contract might be enforced upon stamping it when in Court. Section 7 of the earlier Act says that, to be valid, "the contract must be in writing." I am inclined to think it means only "available," but I am not sure. I also am not sure that "policies" might not be constructed in this case by putting the letters together. Whether that is so or not, the defendant has estopped himself from saying that the insurances were not valid.

BAGGALLAY, L.J.—I am of the same opinion.

BOWEN, L.J.—I agree as to the estoppel. In regard to the interpretation of the Acts, I think it is not that the contract is prohibited, but that a penalty is attached to making it in a certain way. In regard to the old and the new company, I think that after the registration of the new company the defendant dealt with the new company on the footing that all the contracts of the old company were taken over by the new.

Appeal dismissed.

Solicitors—Leslie & Hardy, agents for Bradshaw & Townsend, Barrow-in-Furness, for plaintiffs; D. Warde, agent for Pinckney, Barrow-in-Furness, for defendants.

[IN THE COURT OF APPEAL.]

1885. April 29.

EDWARDS *v.* HOPE.*

Practice—Cross-Judgments in Distinct Actions—Set-off—Lien of Solicitor—Rules of Court, 1883, *Order LXV. rule* 14; *rule* 27, *clause* 37.

Whether rule 14 *of Order LXV. of the Rules of Court*, 1883, *does or does not apply to the case of cross judgments in distinct actions between the same parties, the allowing a set-off for damages or costs between parties is a matter in the discretion of the Court.*

A plaintiff sued for the price of goods, the defendant alleged that the time of credit had not expired, and judgment was entered for her, her costs being taxed at 48*l.* 8*s.* 10*d. The plaintiff sued again after the time of credit had expired, and recovered judgment for* 57*l.* 14*s.* 4*d., the price of the goods, and for costs, which were taxed at* 12*l.* 5*s.* 8*d*:—

Held, *affirming the judgment of the Queen's Bench Division, that the plaintiff ought only to be allowed to set off the amount of the costs of the second action against the costs due by him to the defendant in the first action, so as to preserve the lien of the defendant's solicitor on the costs recovered by her in the first action.*

Appeal from a judgment of the Queen's Bench Division affirming an order of the Judge at chambers limiting the set-off of the plaintiff.

The plaintiff brought an action for goods sold and delivered, in answer to which the defendant alleged that the goods had been sold on a term of credit which had not then expired. Judgment was given for the defendant, with costs, which were taxed at 48*l.* 8*s.* 10*d.* After the term of credit had expired, the plaintiff brought another action in respect of the same goods, in which he recovered judgment for 57*l.* 14*s.* 4*d.*, their value, and the costs, amounting to 12*l.* 5*s.* 8*d.*—making in all 70*l.* The defendant having threatened to issue execution for the amount of her costs in the first action, the plaintiff applied for leave to set off so

* *Coram* Brett, M.R., Baggallay, L.J., and Bowen, L.J.

much of his unsatisfied judgment in the second action as would satisfy the judgment obtained by the defendant in the first action, and the Master granted his application.

The solicitor of the defendant stated in an affidavit that his lien for costs in the first action would be endangered by this order, and on appeal the Judge at chambers varied this order by limiting the set-off of the plaintiff to the costs of the second action—thus allowing the defendant to issue execution for 36*l.* 3*s.* 2*d.*, and leaving the plaintiff with his unsatisfied judgment for 57*s.* 14*s.* 4*d.*

The plaintiff having appealed, the Queen's Bench Division affirmed the order of the Judge at chambers, on the grounds (i.) that they had no power to make an order interfering with the solicitor's lien; and that (ii.) if they had power they would not in their discretion do so.

The plaintiff appealed.

J. H. Etherington Smith, for the appellant.—The judgment of the Queen's Bench Division preserves the lien of the defendant's solicitor by limiting the set-off, and it would seem that the Court considered that rule 14 of Order LXV. (1) does not apply to cross-judgments given in different actions; but there was always power to set off cross damages and costs the result of the same cause or matter, and the lien of the solicitor never attached save to the balance between the parties after such set-off had been allowed; so that if rule 14 does not give more than that, it is superfluous and unnecessary. The practice prior to the Rules of 1883 was governed by rule 63 of the *Regulæ Generales* of Hilary Term, 1853 (2).

The practice in this matter while that rule was in force is stated in *Chitty's Archbold*, 11th ed., at p. 711; and rule 63 of Hilary Term, 1853, is discussed in *Pringle* v. *Gloag* (3). The Rules of 1883 would seem to have been framed so as to carry out the views expressed in that case by Jessel, M.R., and to remove the restriction contained in the Rules of Hilary Term, 1853. In this case the set-off is sought in the action in which execution is sought, that is, in the first action. Rule 14 applies to judgments in distinct actions, and the words "particular cause or matter" only refer to the particular lien of the solicitor. There was therefore a discretion, and it should have been exercised in favour of the plaintiff. *Stephens* v. *Weston* (4), *Lang* v. *Webber* (5), *Newton* v. *Newton* (6), *Brydges* v. *Smith* (7), and *The Alliance Bank* v. *Holford* (8) were referred to.

H. T. Atkinson, for the defendant.—Rule 14 of Order LXV. (1) only applies to cross-judgments in the same action. The wording differs from rule 63 of Hilary Term, 1853, because at that date there could be no cross-claims and no cross-judgments in the same action except as to costs on separate issues. Counter-claims were introduced by the Judicature Acts. A counter-claim gives the solicitor notice that there is a dispute, so that he ought not after that notice to rely for his costs on the solvency of the other party.

He was stopped by the Court.

BRETT, M.R.—Under the old practice there could be no question of set-off of damages in the same suit. But the Courts of common law always had an equitable jurisdiction to prevent absurdity or injustice in cases where there were different judgments between the same parties, so as

(1) Rules of Court, 1883, Order LXV. rule 14: "A set-off for damages or costs between parties may be allowed, notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set-off is sought."

Rule 27, clause 37: "The rules, orders, and practice of any Court whose jurisdiction is transferred to the High Court of Justice or Court of Appeal, relating to costs, and the allowance of the fees of solicitors and attorneys, and the taxation of costs, existing prior to the commencement of the principal Act, shall, in so far as they are not inconsistent with the principal Act and these rules, remain in force, and be applicable to costs of the same or analogous proceedings, and to the allowance of the fees of solicitors of the Supreme Court, and the taxation of costs in the High Court of Justice and the Court of Appeal."

(2) Rule 63 of Hilary Term, 1853, is repealed by the Rules of Court, 1883, App. O.

(3) 48 Law J. Rep. Chanc. 380; Law Rep. 10 Ch. D. 676.

(4) 3 B. & C. 535.

(5) 1 Price, 375.

(6) 8 Bing. 202.

(7) 8 Bing. 29.

(8) 16 Com. B. Rep. N.S. 460.

to set off the damages and costs in judgments between the same parties and to allow execution only for the balance. There was a difference of opinion amongst the Courts, but some of the Courts adopted a practice of taking notice of the solicitor's lien. The General Rules of Hilary Term, 1853, applied to the practice at common law and made that practice uniform, and applied to the cases of judgments between the same parties, even though those judgments were judgments given in respect of different causes of action. Then came the case of *Pringle* v. *Gloag* (3), in which Sir G. Jessel, M.R., pointed out the difficulties which might arise, and discussed the practice which was then in force, and the opinion expressed by him applied to judgments in distinct suits as well as to judgments in the same suit. The Rules of Court, 1883, do away with the Rules of Hilary Term, 1853, and Order LXV. rule 14 removes part of the fetter which those rules imposed; and as rule 63 of Hilary Term, 1853, is repealed, then, where the case is one of judgments between the same parties in the same suit, there is discretion in the Court to allow a set-off. If Order LXV. rule 14 applies to distinct judgments in distinct actions between the same parties, as well as to cross-claims included within the same suit, then the Court has a discretion under that rule to allow a set-off. So that whether that rule does or does not apply to judgments in distinct actions between the same parties, the Court has a discretion to do that which is right and fair between the parties, regard being also had to the position of the solicitor. So that in this case the Court had a discretion, and it has exercised that discretion by allowing in this case the lien of the solicitor, and I am unable to see that that discretion has been wrongly exercised.

BAGGALLAY, L.J.—It seems to me unnecessary to consider whether in this case the discretion has been exercised under Order LXV. rule 14, or under rule 27, clause 37, of the same Order. If, indeed, rule 14 be not co-extensive with rule 63 of the Rules of Hilary Term, 1853, then the Rules of 1883 so far continue the existing practice. If it were necessary to decide now whether rule 14 of Order LXV. is confined to judgments in the same action or not, I should wish to take time to consider the matter, for as at present advised I am inclined to think that the rule is so limited.

BOWEN, L.J.—Before the Judicature Act, where there were cross-judgments in the same or different actions between the same parties, the Courts had an equitable jurisdiction to set off the judgments between the parties if the Court thought fit so to do. The mode in which that was done is pointed out in *Chitty's Archbold's Practice*, at p. 711 of the 11th ed., where it is stated that "where there are cross-judgments in the same or different actions in the same or different Courts between parties substantially the same, whether for debt or damages or costs, or for costs alone, the one may be set off against the other. This may be effected by applying to the Court in which the opposite party has obtained judgment, or to a Judge, for a rule or summons to shew cause why satisfaction should not be entered on the roll, on the applicant acknowledging satisfaction for the same amount on his judgment (or *vice versa* if the applicant's judgment be less), the other party having first satisfied his lien upon the judgment for costs in that particular suit."

It appears that there had been a different practice in the different Courts at Westminster, and rule 63 of the Rules of Hilary Term, 1853, protected the lien of the solicitor to a certain extent. It appears to me that that rule applied to the general case of cross-judgments given in different actions, and put a fetter upon the Court. But that fetter has been removed, and the discussion which took place in *Pringle* v. *Gloag* (3) had an effect on the Rules of 1883. It seems to me that, however the Rules of 1883 are read, the Court can do justice. If rule 14 of Order LXV. only applies to the case of cross-judgments in the same suit, then it would not govern this case; but as the rule of Hilary Term, 1853, is repealed, the old equitable jurisdiction of the Court remains. If, however, rule 14 of Order LXV. does apply to the set-off of judgments in different suits, then the rule is only permissive, and the Court

is entitled to do that which is just and right. The Court is free from the fetter of rule 63 of Hilary Term, 1853, and in this case we ought not to overrule the discretion of the Queen's Bench Division.

Appeal dismissed.

Solicitors—Dubois, Reed & Williams, agents for John Close, Derby, for plaintiff; Lindsay, Mason, Greenfield & Mason, agents for H. T. George, Derby, for defendant.

[IN THE COURT OF APPEAL.]

BANKRUPTCY. 1885. May 8. } *In re* WALLACE; *ex parte* CREDITORS.*

Bankruptcy — Composition — Approval by the Court—Evidence—Official Receiver's Report—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 18 *and* 28.

The report of the official receiver made prima facie evidence in applications for the discharge of a bankrupt by section 28, *sub-section* 4, *of the Bankruptcy Act*, 1883, *is also prima facie evidence in applications for the approval of a composition or scheme of arrangement under section* 18, *sub-section* 6, *whereon, "if any such facts are proved as would justify the Court in refusing the discharge, the Court may refuse to approve the composition."*

Appeal from the decision of Mr. Registrar Pepys refusing to approve a composition of one shilling in the pound, assented to by the creditors in satisfaction of their debts.

The debtor was a shipbroker, and the report of the official receiver stated, among other things, that he had omitted to keep such books of account as are usual and proper in the business carried on by him, and as would sufficiently disclose his business transactions and financial position within three years immediately preceding the bankruptcy.

Section 18 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), provides that,

"(5) The Court shall before approving a composition or scheme hear a report of the official receiver as to the terms of the composition or scheme, and to the conduct of the debtor, and any objections which may be made by or on behalf of any creditor.

"(6) If the Court is of opinion that the terms of the composition or scheme are not reasonable or are not calculated to benefit the general body of creditors, or in any case in which the Court is required under this Act where the debtor is adjudged bankrupt to refuse his discharge, the Court shall, or if any such facts are proved as would under this Act justify the Court in refusing, qualifying, or suspending the debtor's discharge, the Court may, in its discretion, refuse to approve the composition or scheme."

By section 28 (2) it is provided that "the Court shall, . . . on proof of any of the facts hereinafter mentioned, either refuse the order of discharge, or suspend the operation of the order for a specified time, or grant an order of discharge subject to conditions.

"(3) The facts hereinbefore referred to are (among others),

"(*a*) That the bankrupt has omitted to keep such books of account as are usual and proper in the business carried on by him, and as sufficiently disclose his business transactions and financial position within the three years immediately preceding his bankruptcy.

"(4) For the purposes of this section the report of the official receiver shall be *prima facie* evidence of the statements therein contained."

H. Reed, for eleven creditors, supported the appeal.—The composition has been approved by the creditors on the ground that otherwise they will receive nothing, and there was no evidence before the Registrar upon which he could withhold the approval of the Court. The ground on which the Registrar acted was that the debtor had not kept proper books of account. This was not "a fact proved" under section 18, sub-section 6. The only evidence of it was the report of the official receiver; and although this report is *prima facie* evidence upon an application

* *Coram* Brett, M.R., Baggallay, L.J., and Bowen, L.J.

for a discharge under section 28, it is not evidence at all under section 18. The debtor might explain the insufficiency of his books, as by proving that he had instructed an accountant to keep them who had failed to do so.

S. Woolf, for the debtor.

M. J. M. Mackenzie, for the official receiver.

BRETT, M.R.—The report of the official receiver is *prima facie* evidence both upon an application for a discharge under section 28, and upon an application for the approval by the Court of a composition under section 18. Sub-section 6 of section 18 says that, "if such facts are proved as would under this Act justify the Court in refusing a discharge, the Court may refuse to approve the composition." That means, if the facts justifying a refusal of a discharge are proved in the manner provided upon an application for a discharge. The absence of books is a capital offence in the conduct of a trader, and the explanation suggested cannot for a moment be accepted from a business point of view. It does not follow that the Court will approve a composition because it is accepted by the creditors. The facility with which creditors accepted compositions was one of the mischiefs at which the Act of 1883 was aimed. They do not do so out of generosity. It is out of mere laziness. It is no argument at all that the creditors are willing to accept fourpence halfpenny or a shilling in the pound. The Registrar must exercise his discretion, and protect the creditors in spite of themselves.

BAGGALLAY, L.J., and BOWEN, L.J., concurred.

Appeal dismissed.

Solicitors—W. Bagot Hart, for creditors and debtor; W. W. Aldridge, for official receiver.

[IN THE COURT OF APPEAL.]

1885. Jan. 30. Feb. 13. } *Ex parte* ANDERSON; *in re* TOLLEMACHE.*

Bankruptcy—Proof of Debts—Judgment—Suspicious Circumstances—Onus of Proof—Mode of proving Judgment—Evidence.

In bankruptcy, proof may be made on a judgment debt; but if there are suspicious circumstances about the judgment, the creditor must prove the consideration.

Proof tendered long after the bankruptcy on a judgment recovered shortly after the bankrupt's majority on a bill of exchange, the record and bill of exchange being both lost, rejected.

A judgment may be proved by a certified copy of an entry in the entry book of judgments of a superior Court.

Appeal from Mr. Registrar Pepys disallowing proof of a judgment debt in the bankruptcy of the Hon. W. L. F. Tollemache, by courtesy Lord Huntingtower.

The bankrupt died in 1872, and until recently there had been practically no assets; but on the death of his father a reversionary interest vested in the bankrupt fell into possession and became available assets in the bankruptcy. The act of bankruptcy was committed on the 2nd of August, 1842, and the *fiat* was issued on the 2nd of September following. The creditor was the executrix of James Hall, who died on the 24th of October, 1870.

As evidence of the judgment, an examined copy, certified by the assistant-keeper of the public records, of the entry of a judgment in the entry book of judgments of the Court of Exchequer for Michaelmas Term, 1842, was tendered. It was an entry on the 4th of January, 1842, in an action of promises brought by James Hall against the bankrupt, of judgment for 561*l.* 6*s.* 8*d.* damages. The solicitor of James Hall, whose name appeared on the entry, deposed that he believed the judgment was founded on a bill of exchange accepted by the bankrupt; but no such bill was produced, nor the original judgment. The bankrupt attained

* *Coram* Brett, M.R., Cotton, L.J., and Lindley, L.J.

the age of twenty-one years on the 4th of July, 1841.

C. Willis, Q.C., and *S. Woolf*, for the creditor.—The judgment is *prima facie* sufficient as proof, and the assignees made out no case against it—*Ex parte Bryant* (1).

[BRETT, M.R., referred to *Ex parte Revell; in re Tollemache, No.* 2 (2).]

In that case the judgment was after the act of bankruptcy.

They also referred to *Ex parte Kibble* (3).

Winslow, Q.C., and *Yate Lee*.—In bankruptcy a judgment cannot be relied on, and the creditor must prove the consideration—*Ex parte Williamson* (4). The creditor has been guilty of delay, and the judgment ought to be proved by an office copy of it—*Cooke's Bankrupts' Law* (8th ed. vol. i. p. 153).

C. Willis, in reply, cited *Ex parte Ritso* (5) and *Cooke's Bankrupts' Law* (vol. ii. p. 33).

BRETT, M.R. (on Feb. 13).—In this case the evidence on which the proof was based was that judgment in respect of a bill of exchange had been recovered not very long after the bankrupt came of age. We find on enquiry that a copy of the judgment book is the proper proof of a judgment, as the original would be in the hands of the plaintiff or his solicitor. It was contended on the part of the assignees that if no evidence of the debt but a judgment is given, the proof must be rejected, and that the consideration must be proved; but we cannot go that length. On the other hand, it was argued for the creditor that the judgment was conclusive unless impeached by evidence by the assignees. We cannot go that length either. In our opinion, if suspicion is cast on the judgment by the circumstances, the consideration must be proved. In this case the facts that the debt was a bill of exchange, that the judgment was obtained shortly after the bankrupt came of age, and that neither the bill of exchange nor the original record of the judgment is forthcoming, are sufficiently suspicious circumstances to throw the onus of proof on the creditor.

COTTON, L.J.—I am of the same opinion. No attempt was made to prove on this debt until now, forty years afterwards. We cannot disregard the judgment; but grave suspicion is thrown upon it, and no explanation of the real transaction between Hall and the bankrupt has been given. Lord Justice Lindley concurs in this judgment without limiting himself to our reasons.

Appeal dismissed.

Solicitors—J. R. Chidley, for creditor; Still & Son, for assignees.

(1) 1 Ves. & B. 211.
(2) *Ante*, p. 92; Law Rep. 13 Q.B. D. 720.
(3) 44 Law J. Rep. Bankr. 63; Law Rep. 10 Chanc. 373.
(4) 1 Atk. 82.
(5) 52 Law J. Rep. Chanc. 535; Law Rep. 22 Ch. D. 529, 532.

[IN THE COURT OF APPEAL.]

BANKRUPTCY. 1885. Jan. 23. } *Ex parte* WHITE; *in re* WHITE.*

Bankruptcy — Discharge — Contracting Debt without reasonable ground of expectation of paying — Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 28, *sub-s.* 3 (c).

Bankrupts who had begun business without capital and with a mortgage on their premises, goodwill, and stock in trade, refused their discharge except on condition of judgment being entered against them for all their provable debts.

Appeal by the bankrupts from the decision of Mr. Registrar Pepys granting an order of discharge conditionally upon their consenting to judgment being entered against them for all the debts provable in bankruptcy.

The bankrupts in August, 1880, began as partners in the business of upholsterers, painters, and decorators. They had no capital of their own, but borrowed 3,000*l.* on the security of their leasehold premises, the goodwill of the business, and their

* *Coram* Brett, M.R., Cotton, L.J., and Lindley, L.J.

existing and after-acquired stock in trade, fixtures, furniture, and book debts. On their becoming bankrupt the mortgagee took possession.

Section 28 (2) of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), provides that "the Court shall, . . . on proof of any of the facts hereinafter mentioned, either refuse the order, or suspend the operation of the order for a specified time, or grant an order of discharge subject to such conditions as aforesaid." The "conditions aforesaid" are "with respect to any earnings or income which may afterwards become due to the bankrupt, or with respect to his after-acquired property." Among "the facts hereinafter mentioned" is "that the bankrupt has contracted any debt provable in the bankruptcy without having at the time of contracting it any reasonable or probable ground of expectation (proof whereof shall lie on him) of being able to pay it."

S. Boulter, for the bankrupts.
H. Reed, for the trustee.
M. Mackenzie, for the official receiver.
Winslow, Q.C., and *F. Evans*, for the mortgagee.

BRETT, M.R.—I think the Registrar was right. The bankrupts began business without capital and burdened with an incumbrance which enabled the mortgagee to seize all they had at any moment. The question is whether they contracted their debts without having any reasonable or probable ground of expectation of paying them. The decision must be affirmed, but the costs of the official receiver appearing will not be allowed.

COTTON, L.J., and LINDLEY, L.J., concurred.

Solicitors—Thomson, Son & Brook, for trustee; Aldridge, for official receiver; Combs, Bayly & Henley, for mortgagee.

1885. May 12. } FARRER (*appellant*) *v.* NELSON (*respondent*).

Nuisance — Overstocking Land with Game—Injury to Crops—Right of Action.

The appellants were lessees of the sporting and shooting rights over an estate a portion of which was occupied by the respondent as a tenant farmer. The appellants transferred 450 *pheasants from one part of the estate to a wood situate on the respondent's farm but excluded from his occupation. The respondent's crops having been damaged by the pheasants, he brought an action in the County Court for "damages caused by the appellants' overstocking his farm with game":*—Held, *that the action was maintainable.*

Special Case stated on appeal from the Judge of the Westmoreland County Court.

The respondent sued the appellants in the Kendal County Court for damages, of which the following were the particulars delivered:—"The plaintiff claims 27*l.* for damages caused by the defendants' overstocking the plaintiff's farm at Low Sizergh, near Kendal, during the spring, summer, and autumn of the year 1884, with game, the defendants having the right of sporting over the plaintiff's farm."

The respondent was the tenant of a farm (but exclusive of the woods and coppices thereon) at Low Sizergh, near Kendal, under a lease which reserved the sporting and shooting rights to the landlord. The appellants were lessees of the sporting and shooting rights over the Sizergh Castle estate, of which the respondent's farm formed part.

During the spring, summer, and autumn of the year 1884, the appellants had reared in coops elsewhere than on the respondent's farm, but on another part of the Sizergh Castle estate, about 1,500 pheasants, and had carried in the coops about 450 pheasants into a coppice wood of about eighty acres which was situate on the respondent's farm but was reserved to the landlord in the respondent's lease. About an acre of the coppice wood had been cut down for the purpose of rearing pheasants, into which 450 pheasants were brought; and this part of the coppice wood adjoined within about five yards

the fence dividing the coppice wood from the respondent's field in which the damage complained of was done. It was proved that as many as a hundred pheasants at a time had been seen running in the respondent's field adjoining the coppice in the month of August, when the respondent's grain and other crops were ripening. The damage was admitted.

The County Court Judge held that the respondent was entitled to recover the amount of the damage so occasioned, and gave judgment for the amount claimed by him in his particulars of demand.

The question for the Court was whether or not the respondent, upon the facts above stated, was entitled in point of law to recover the damages which were claimed by him from the appellants.

W. R. Kennedy, for the appellants.—The ordinary propagation of game in sporting rights is not actionable. In *Boulston's Case* (1) it is said, "If a man makes coney-boroughs in his own land, which increase in so great number that they destroy his neighbours' land next adjoining, his neighbours cannot have an action on the case against him who makes the said coney-boroughs; for so soon as the coneys come on his neighbour's land he may kill them, for they are *feræ naturæ*." There is no case to shew that the overstocking of game to the damage of a neighbour is actionable. The nuisance to the neighbour would be the same whether the game increased from natural causes, or whether they were turned down in excessive quantities in the first instance. In the present case the pheasants had only been transferred from one part of the Sizergh estate to another; they had all been bred, and not brought upon it. In *Hilton* v. *Green* (2), which was a claim for damages against a person who had the right of shooting over a farm for exceeding his rights by walking over fields of standing crops and turning rabbits on to the farm, Erle, C.J., directed the jury to the effect that if the rabbits were put into a wood, and thence strayed on to the farm, the defendant would not be liable for the injury they caused. He also cited *Birkbeck* v. *Paget* (3).

W. R. Smith, for the appellants.

POLLOCK, B.—The point here raised is one of interest; however, I have no doubt but that the County Court Judge has decided rightly upon the point of law, which is all with which the Court has to deal.

The proposition which seems to arise first is whether an action can be brought against a neighbour who imports animals on to his land which do damage to the adjoining land. I should say that beyond all doubt such an action will lie, whether the animals be *feræ naturæ* or not, on the ground that it is a breach of the maxim *Sic utere tuo ut alienum non lædas.*

But this does not dispose of the question of law, whether the importation of animals *feræ naturæ* which a man is entitled to keep is an act which would render the person importing them liable for any injury which they may do to his neighbours. This question goes to the root of the whole case. There is no doubt that every person has a right to keep on his land such game as would be usually bred upon it. It may be a law which is peculiar to this country, and has arisen out of our feudal laws. The moment, however, at which that which was right in law when naturally done is exceeded, the right at once ceases. And this is borne out by *Birkbeck* v. *Paget* (3). So long as a sporting tenant exercises his ordinary rights—namely, those which his landlord might himself have exercised—he cannot be made liable for injury done by his game; but when he seeks to do more, and brings game of an unusual amount on the land, and thereby increases the amount by what I may call non-natural means, he is seeking to enjoy a right which is not given him by his landlord—because his landlord could not enjoy such a right himself—and an action will lie for any damage thereby caused to his neighbours. The action is based upon the fact that the appellants have brought an undue amount of game upon the part of the Sizergh estate which the respondent

(1) 3 Co. Rep. 212.
(2) 2 Foster & Finlason's Rep. 821.
(3) 31 Beav. 403.

farmed, and that his crops have in consequence been injured. With the questions of fact involved in the case we have nothing to do; they have been found by the County Court Judge. On the question of law submitted to us we are of opinion that the decision of the County Court Judge must be affirmed.

DAY, J., concurred.

Judgment for the respondent.

Solicitors—Gregory & Co., agents for Crowther & Miller, Liverpool, for appellant; E. Warriner, agent for C. G. Thomson & Wilson, Kendal, for respondent.

1885. Feb. 13, 28. STEWART AND COMPANY *v.* THE MERCHANTS' MARINE INSURANCE COMPANY (LIMITED).

Ship and Shipping—Marine Insurance—Valued Time Policy—"Free from Particular Average under three per cent."—Particular Losses on separate voyages, each under three per cent., amounting in the aggregate to more than three per cent.

In a valued time policy of marine insurance the ship and freight were warranted free from average under three per cent., unless general, or the ship be stranded, sunk, or burnt:—Held, *that where the aggregate of the losses occurring during the whole period insured for amounted to three per cent., although the amount of the losses on each distinct voyage during the period was under three per cent., the underwriters were liable.*

Blackett v. The Royal Exchange Assurance Company (2 Cr. & J. 244; 1 Law J. Rep. Exch. 101) *followed.*

Action tried in London before Stephen, J., without a jury.

The claim was to recover 46*l.* 18*s.* 2*d.* upon a valued policy of marine insurance from the 11th of January, 1882, to the 11th of January, 1883, the ship and freight warranted free from average under three per cent., unless general, or the ship be stranded, sunk, or burnt.

Defence: that the loss claimed for was not general, and that the vessel was not stranded, sunk, or burnt, and that no particular average loss amounting to three per cent. accrued during any one voyage in the period covered by the policy, and that the loss was the aggregate of several distinct particular average losses on separate and distinct voyages, each of which amounted to less than three per cent.

The reply admitted the several allegations in the defence, but alleged that, according to the true intent and meaning of the policy, the loss sued for happening as described in the defence was a loss for which the defendants were liable.

The facts and arguments appear sufficiently from the judgment.

T. N. Hilbery, for the plaintiffs.

J. Gorell Barnes, for the defendants.

Arnould on Marine Insurance, 5th ed. vol. ii. p. 801, *Phillips on Insurance*, s. 1780, *Stevens and Benecke on Average*, p. 401, and *Wilson* v. *Smith* (1), were referred to during the argument.

Cur. adv. vult.

STEPHEN, J. (on February 28), delivered judgment.—This case is one in which there was an insurance of a certain ship, and it was an insurance for a year—a time policy. The policy is in form a voyage policy—there are references throughout to the voyage—drawn for the purpose of being a voyage policy, but altered into a time policy by inserting in the middle of the policy the words "and for and during the space of twelve calendar months, &c., &c." Of course in such a state of things the meaning of a provision, not altogether clear in itself, is rendered still more difficult to determine. I shall give my reasons very shortly, because, when you come to the gist of it, the case lies in a very small compass.

The policy declares, amongst other things, that the subject of the insurance, the ship and freight, is "warranted free from average under 3*l.* per centum, unless general, or the ship be stranded, sunk, or

(1) 3 Burr. 1551.

Stewart v. *Merchants' Marine Insur. Co.*

burnt"—in other words, it is warranted free from average under three per cent.; and the question is whether that means warranted free from every average loss which may occur between the 11th of January, 1882, and the 11th of January, 1883, amounting in the whole to less than three per cent. of the amount insured, or whether it means warranted free from any one accident—that is to say, that the underwriters are not to pay for any accident unless the loss amounts to three per cent. of the amount insured. That is the question in dispute, and certainly it is a narrow question, arising upon the interpretation of a very few words in this very singular document.

Now, the matter is—I will not say without authority, there is some authority—but it is very bare of authority, and although a good many authorities were referred to by the learned counsel on the one side and on the other, with very full and ingenious arguments, it appears to me that the authorities of which I have to take notice are reduced to a single case—*Blackett* v. *The Royal Exchange Assurance Company* (2)—which is illustrated more or less, although only illustrated, by two American cases—namely, *Brooks* v. *The Oriental Insurance Company* (3), and *Donnell* v. *The Columbian Insurance Company* (4), being a judgment of Mr. Justice Story. It appears to me, with reference to the weight of authority, that there is a great deal to be said on both sides. Mr. Barnes and Mr. Hilbery both referred to the case of *Blackett* v. *The Royal Exchange Assurance Company* (2), and Mr. Hilbery said: Even in a voyage policy you have to add together the different averages, *a fortiori* you would do so in a time policy, or rather, as here, a voyage policy turned into a time policy. Mr. Barnes, on the other hand, argued with a great deal of force that if you took that interpretation of the matter it would tend to defeat the very object with which the policy was drawn up—and I think there is a great deal of weight in that; but then the truth is, this does not shew me what the proper meaning of the words is, but it shews me what kind of agreement the parties would be inclined to make if they considered their own interests. If I were to be guided by this latter consideration only, I should have been of Mr. Barnes's opinion, but I have to determine the true meaning of the words used, and I think that *Blackett* v. *The Royal Exchange Assurance Company* (2) is very nearly an authority in this case. As to the other cases, they contradict each other flatly. *Brooks* v. *The Oriental Insurance Company* (3) is directly in point in favour of the contention of the underwriters; *Donnell* v. *The Columbian Insurance Company* (4) is the other way. But I think that the reasoning of Mr. Justice Story in *Donnell* v. *The Columbian Insurance Company* (4) is weighty, and it commends itself to my mind. Upon the whole, therefore, I give judgment for the plaintiffs.

Judgment for plaintiffs, with costs.

(2) 2 Cr. & J. 244; 1 Law J. Rep. Exch. 101.
(3) 7 Pickering (24 Massachusetts Reports), 258.
(4) 2 Sumner, 366.

Solicitors—F. W. & H. Hilbery, for plaintiffs
Waltons, Bubb & Co., for defendants.

[IN THE COURT OF APPEAL.]

BANKRUPTCY. 1885. Jan. 30. } *Ex parte* BONHAM; *in re* TOLLEMACHE.*

Bankruptcy—Proof of Debt—Judgment obtained after act of bankruptcy.

Where the only evidence of a debt tendered for proof in bankruptcy is a judgment obtained after the act of bankruptcy, the proof cannot be allowed.

Appeal from an order of Mr. Registrar Pepys rejecting the proof of a judgment debt in the bankruptcy of the Hon. W. L. F. Tollemache, by courtesy Lord Huntingtower.

The bankrupt died in 1872, but on the death of his father a reversionary interest vested in the bankrupt fell into possession and became available assets in the bankruptcy. The act of bankruptcy was com-

* *Coram* Brett, M.R., Cotton, L.J., and Lindley, L.J.

Ex parte Bonham; in re Tollemache (App.), Bankr.

mitted on the 2nd of August, 1842, and the fiat issued on the 2nd of September following. The proof was tendered by the widow and executrix of George Bonham, who died in 1874. The evidence of the debt was a copy of an entry in the judgment book for 1842 of the Court of Queen's Bench, whence it appeared that 500*l.* damages were on the 21st of August, 1842, recovered by the testator in an action on the case upon promises upon the promissory note of the bankrupt indorsed by him.

Cooper Willis, Q.C., and *S. Woolf*, for the appellant, cited *Ex parte Helm* (1) as authority that proof could be made on a judgment obtained after the act of bankruptcy. They also cited *Ex parte Bryant* (2).

Winslow, Q.C., and *Yate Lee*, for the assignees, were not called upon.

BRETT, M.R.—I am prepared to lay this down, that where the only evidence of the debt is a judgment obtained after the act of bankruptcy, the proof cannot be made.

COTTON, L.J., and LINDLEY, L.J., concurred.

Appeal dismissed.

Solicitors—J. R. Chidley, for appellant; Still & Son, for assignees.

1884. Oct. 25. } THE QUEEN *v.* BIRON AND OTHERS.

Practice—Justice of the Peace—Rule to a Justice under Jervis's Act (11 & 12 *Vict. c.* 44), *s.* 5—*Mandamus to hear Application for Summons—Concurrent Remedies—Applicant in Person.*

[For the report of the above case, see 54 Law J. Rep. M.C. 77.]

(1) Mont & M'Ar. 70.
(2) 1 Ves. & B. 211.

[IN THE COURT OF APPEAL.]

BANKRUPTCY. 1885. Jan. 23. } KOSTER *v.* PARK.*

Debtor's Summons—"Means to pay the debt"—Voluntary Gift—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 5, *sub-s.* 2.

Semble, *an allowance voluntarily given to the defendant may be "means to pay the debt" which he must have, or have had since the judgment, so as to give jurisdiction to commit him to prison.*

Appeal from the refusal of Cave, J., to commit a judgment debtor to prison.

The judgment was for 128*l.* 15*s.* 8*d.*, and the debtor had been ordered, under a judgment summons, to pay by monthly instalments of 5*l.* He did not pay for five months, and was committed on a second judgment summons, but released on paying 20*l.* On five further instalments being unpaid, the plaintiff took out another judgment summons, when the defendant admitted that he had since his last payment had 60*l.* in his possession, being an allowance of 5*l.* a week made voluntarily by his brother.

By the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 5, sub-s. 2, the jurisdiction of committing to prison "shall only be exercised where it is proved to the satisfaction of the Court that the person making default either has or has had since the date of the order or judgment the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects to pay the same."

F. C. Willis, for the plaintiff.
The defendant in person.

BRETT, M.R.—I will only say that I am not satisfied that the learned Judge was wrong in saying that it had not been shewn that the defendant had the means of paying.

COTTON, L.J.—In my opinion the order may be made from whatever source the "means" of the defendant come, but I

* *Coram* Brett, M.R., Cotton, L.J., and Lindley, L.J.

do not dissent from the view that the evidence was not sufficient.

LINDLEY, L.J.—It appears to me immaterial how the means come to the defendant; but our information in the present case is not full enough.

Appeal dismissed.

Solicitor—W. F. Stokes, for plaintiff.

[IN THE COURT OF APPEAL.]

1885. Feb. 6. } *Ex parte* DEVER; *in re* SUSE AND SIBETH.*

Bankruptcy—Acceptances with Cover—Bankruptcy of Acceptor and Drawer—Destination of the Covering Securities—Rule in Ex parte Waring.

Where several acceptances have been given under a letter of credit, and, on both drawer and acceptor becoming bankrupt, securities by way of cover are still unrealised in the hands of the acceptor which by the letter of credit and the course of dealing were specifically applicable to cover certain of the acceptances, the proceeds of the securities are, under the rule in Ex parte Waring (19 Ves. 345), *applicable in payment of the holders of the acceptances to which they were so specifically applied, and not in payment rateably of the holders of all the acceptances.*

The rule in Ex parte Waring *is not excluded by the fact that the acceptor down to the time of his bankruptcy was entitled to realise the securities at discretion, crediting interest to his correspondent, so long as at the time of the bankruptcy they were not realised.*

Evidence that of two members of a firm abroad one was lunatic and out of the foreign jurisdiction, and that the estate of the firm was being administered in the bankruptcy of the other, admitted as proof of the bankruptcy of the firm.

Appeal of the trustee from the order of Mr. Registrar Pepys whereby he ordered that the proceeds of four bills of exchange in the hands of the trustee, and remitted to the liquidating debtors as cover for bills drawn on them by Fryer, Schultze & Co., merchants, of Ceylon, whose affairs also were in liquidation there, should be applied to the payment of the bills for which they were cover, and which were held for value by the Chartered Mercantile Bank and the Comptoir d'Escompte de Paris respectively.

The debtors stopped payment on the 4th of October, 1883. They filed a liquidation petition on the 9th. A liquidation by arrangement was afterwards resolved upon, and Dever appointed trustee. In consequence of the suspension of the debtors, the Ceylon firm stopped payment. It consisted of two partners, one of whom carried on the business for himself and for the other, who had become insane, and had given a power of attorney before his insanity. On the petition of the acting partner the firm was adjudicated insolvent in the District Court of Colombo in November, 1883.

The liquidating debtors carried on business as merchants and bankers in London, and on the 15th of September, 1882, sent to Fryer, Schultze & Co., who carried on business in Ceylon, the following letter of credit: "We hereby authorise you to draw on us, at three, four, or six months' sight, for any sums not exceeding 10,000*l.* at one time; such draft or drafts to be covered within two, three, or five months, according as they have been issued at three, four, or six months, by your remittances on good London houses, with bills of lading and invoices of the produce to which such remittances refer attached. The credit resumes its original force as soon as your drafts have been covered in the manner described above. And we hereby agree with you, and also, as a separate engagement, with the *bona fide* holders respectively of the bills drawn in compliance with the terms of this credit, that the same shall be duly accepted on presentation, and paid at maturity, if drawn or negotiated up to the 1st of September, 1883."

In accordance with this letter of credit the debtors had, at the date of the filing of the petition, accepted drafts of the Ceylon firm to the amount of 11,000*l.*, and had received remittances from them amounting to 3,000*l.* Of these remittances two bills

* *Coram* Brett, M.R., Cotton, L.J., and Lindley, L.J.

for 250*l.* and 650*l.* were unconverted at the date of the petition. After the petition, Dever received two other bills, for 768*l.* and 762*l.* respectively, also remitted by the Ceylon firm as cover under the letter of credit. The bills for 250*l.* and 650*l.*, and part of the bill for 768*l.*, were sent as cover for acceptances by the debtors for 1,000*l.* and 1,850*l.* in the hands of the Chartered Mercantile Bank; and the rest of the bill for 768*l.*, and the bill for 762*l.*, were sent as cover for an acceptance by the debtors for 950*l.* in the hands of the Comptoir d'Escompte de Paris.

The course of dealing between the debtors and the Ceylon firm allowed acceptance commission to the debtors, and when the remittances matured later than the acceptances the Ceylon firm was debited with interest, and *e converso*. The debtors dealt with the remittances as they thought expedient. When the acceptances for 10,000*l.* were covered, the Ceylon firm could draw for another 10,000*l.*, and so on by way of "revolving credit."

Cohen, Q.C., and *S. Woolf*, for the trustee.—*Ex parte Waring* (1) does not apply, as the acceptors were entitled to deal with the remittances at discretion. The security is not sufficient to cover the whole amount of the acceptances, in which event the House of Lords, in *The Royal Bank* v. *The Commercial Bank* (2), declined to apply *Ex parte Waring* (1) to a Scotch bankruptcy. The remittances were neither the property of the remitter nor impressed with a trust.

They cited *Powles* v. *Hargreaves* (3), *In re Barned's Banking Company* (4), *In re The Gothenburg Commercial Company* (5), *Ex parte Broad* (6), and *Tooke* v. *Hollingworth* (7).

The remittances ought to be applied rateably to all the acceptances—*Ex parte Gomez* (8). There is not sufficient proof of the bankruptcy of the Ceylon firm.

(1) 19 Ves. 345.
(2) Law Rep. 7 App. Cas. 366 (Scotch).
(3) 3 De Gex, M. & G. 430; 23 Law J. Rep. Chanc. 1.
(4) Law Rep. 19 Eq. 1.
(5) 29 W. R. 358.
(6) *Ante*, p. 79; Law Rep. 13 Q.B. D. 740.
(7) 5 Term Rep. 215.
(8) Law Rep. 10 Chanc. 639.

Winslow, Q.C., and *A. C. Nicoll*, for the Chartered Bank and Comptoir d'Escompte.—The bankruptcy of one partner puts an end to the partnership, and the joint assets are distributed in the bankruptcy of the firm even in the absence of a solvent partner—*Barker* v. *Goodwin* (9). The remittances were not sent as a general security, as in *The City Bank* v. *Luckie* (10).

Brabant, for the trustee of the Ceylon firm.

Cohen, Q.C., in reply.

BRETT, M.R.—The rule in *Ex parte Waring* (1) seems to be accurately described in Mr. Eddis's book when he says: "Where as between the drawer and the acceptor of a bill of exchange a security has by virtue of a contract between them been specifically appropriated to meet that bill at maturity, and has been lodged for that purpose by the drawer with the acceptor, then, if both drawer and acceptor become insolvent, and their estates are brought under a forced administration, the bill holder, though neither party nor privy to the contract, is entitled to have the specifically appropriated security applied in or towards payment of the bill." Have these bankers brought themselves within that rule? The drawing firm was in Colombo, the acceptor in London. Was there specific appropriation? That depends on the construction of the letter of the 15th of September. The drafts are to be covered within two, three, or five months (according as they have been issued at three, four, or six months), and there purports also to be an engagement with the *bona fide* holders of the bill. It is clear, therefore, that each draft is to be a separate transaction, and that the security was specifically appropriated. The next question is whether the drawer's estate was in forced administration. One of the partners is a lunatic in Germany, and it seems that the law in Ceylon is that if one partner is out of the jurisdiction, the assets of the firm may be administered in his absence. The case is therefore brought within the very terms of the rule which truly interprets *Waring's Case* (1). The case of *In re The Gothen-*

(9) 11 Ves. 78.
(10) Law Rep. 5 Chanc. 778.

burg Commercial Company (5) has been cited to shew that the payment of interest makes a difference. No doubt if the acceptor does use the securities and credits the drawer with interest, and that is made known to the drawer and he does not object, those securities are taken out of the rule in *Ex parte Waring* (1); but these securities were in existence intact at the time of the insolvency. Upon the construction of the letter I think these securities were deposited specifically, not generally.

COTTON, L.J. — I am of the same opinion. The acceptor's estate is being administered here; and as to the Ceylon firm, one partner is bankrupt there, and the other is out of the jurisdiction; and we are told that the estate of the firm is being administered so far as the law of Ceylon allows. It must not be inferred from the principle, as stated in Mr. Eddis's book, that the rule does not apply unless there has been an appropriation of a security to meet a particular bill. In my opinion the rule in *Ex parte Waring* (1) is perfectly reasonable, and easily to be explained. It has been said that the security in this case was not impressed with a trust; but the question is whether the property, which in the events which have happened is in the bankrupt's hands, could be applied by the bankrupt at the moment of his insolvency to any purpose he pleased. He was, when solvent, entitled to apply it to his own uses, but that does not shew that the property is not subject to an equity when he is insolvent. I therefore think the rule in *Ex parte Waring* (1) ought to be applied. Then comes the question whether the remittances *in specie* ought to be applied to the acceptances which they covered, or rateably among all the holders of the acceptances under the letter of credit. I think that would be inventing a new equity. In my opinion, therefore, the rule ought to be applied only in favour of the holders of those acceptances which the remittances were sent to meet.

LINDLEY, L.J.—I am of the same opinion. As to the point of the insolvency of the drawers, I think that the lunacy of the partner, and his absence from the jurisdiction, sufficiently explain the administration of the assets of the firm in the bankruptcy of the other partner. There was therefore a double bankruptcy; and, having regard to the terms of the letter of credit and the course of dealing, I think that the bills remitted which were not converted into cash at the time of the insolvency were specifically appropriated to the bills which they were sent to cover. With regard to the question whether the remittances ought to be applied specifically or rateably, I think the answer depends on the rights of the drawers. They could have insisted that the bills should be applied specifically.

Appeal dismissed.

Solicitors — Roberts & Barlow, for trustee; Clarke, Rawlins & Co., for respondents.

[IN THE COURT OF APPEAL.]

BANKRUPTCY. 1885. May 12. } THE QUEEN *v.* THE REGISTRAR OF THE GREENWICH COUNTY COURT.*

Bankruptcy—Practice—Public Examination of Debtor—Solicitor—Representative of Creditor—Authority in Writing——Bankruptcy Act, 1883, *s.* 17, *sub-s.* 4.

The Registrar of a County Court sitting in bankruptcy has power to refuse audience to a solicitor retained on behalf of a creditor to question a debtor at his public examination if the solicitor does not, when requested so to do, produce an authority in writing; for such solicitor is the representative of the creditor within the meaning of the Bankruptcy Act, 1883, *s.* 17, *sub-s.* 4.

Appeal from a decision of the Divisional Court.

The Registrar of a County Court sitting in bankruptcy refused to allow a solicitor, who appeared on behalf of certain creditors who had tendered proofs, to question the

* *Coram* Brett, M.R., Baggallay, L.J., and Bowen, L.J.

debtor at his public examination unless he produced an authority in writing to do so.

The solicitor and the Incorporated Law Society applied to a Divisional Court under 19 & 20 Vict. c. 108. s. 43, for an order directing the Registrar to allow the solicitor to question the debtor.

The Divisional Court (Grove, J., and Hawkins, J.) refused the application.

The solicitor and the Incorporated Law Society appealed.

R. T. Reid, Q.C., and *Linklater*, for the appellants.—Sub-section 4 of section 17 of the Bankruptcy Act, 1883, which provides that any creditor who tendered a proof, or his representative authorised in writing, may question the debtor concerning his affairs and the causes of his failure, does not apply. The creditor has a right to be represented by his counsel or solicitor. The intention of the sub-section is to allow the creditor to authorise in writing some person other than counsel or a solicitor to represent him at the public examination of the debtor.

[BAGGALLAY, L.J., referred to section 17, sub-section 5, as shewing that where the Act intended that a party should be represented by counsel or a solicitor, provision was made to that effect.]

Section 151 shews that the object of the Act is to preserve the right of audience. The solicitor here was acting as an advocate, and was therefore entitled to be heard.

Ex parte Broadhouse (1), *Ex parte Landrock* (2), and the Bankruptcy Act, 1869, s. 80, sub-s. 8, were referred to.

BRETT, M.R.—In this case a solicitor desired under section 17, sub-section 4, of the Bankruptcy Act, 1883, to question a debtor at his public examination concerning his affairs. The Registrar declined to hear him unless he produced an authority in writing from the creditors to examine the debtor, but the solicitor declined to do so. It was argued that the Court ought to direct the Registrar to allow the solicitor to examine the debtor without producing an authority in writing, upon the ground that sub-section 4 does not apply to solicitors. It cannot be denied that if the sub-section does apply and a solicitor must receive an authority in writing, it would not be wrong for the Registrar to request that authority to be produced. There are two objections to granting the application—first, because the solicitor is not the person to make the application under section 43 of 19 & 20 Vict. c. 108—and even if the Registrar was wrong in refusing to give audience to the solicitor, the proper person to complain was the creditor himself; and secondly, even supposing the solicitor could make the application, the true construction of sub-section 4 of section 17 is that it includes a solicitor—so that the Registrar was justified in what he did. In my opinion section 43 of 19 & 20 Vict. does not apply to solicitors. The word "party" there means a litigant in the Court, and a creditor, or a person assuming to be a creditor, is a litigant within the meaning of the section. A larger view, however, may be taken, for it may be said that the solicitor here was applying not on his own behalf only, but as representing the whole body of solicitors, and that therefore the Registrar, in refusing him a right of audience, had refused to the whole body of solicitors a right to which it was entitled: so that the Court, for the protection of its officers, should hear the application. That is one way of stating the question raised as to section 43, which, however, it is not necessary to determine, because the Registrar was, in my opinion, right in the view he took. The question, which depends upon the construction to be put upon sub-section 4 of section 17 of the Act of 1883, is whether a solicitor who appears when and for the purpose for which this solicitor appeared is a representative who must be "authorised in writing" within the meaning of the sub-section. The section does not apply to counsel, for he has the whole conduct of the case, and can act even against the instructions of the client. A counsel, therefore, is not the representative of his client, and does not require any authority in writing. But the normal character of a solicitor is to act both in and out of Court for his client; he is therefore, in ordinary and legal language, the representative of his client, and, coming

(1) 36 Law J. Rep. Bankr. 29; Law Rep. 2 Ch. App. 655.

(2) 1 Morrell's Bankr. Cas. 81.

within the very words of the sub-section, must be "authorised in writing." He must therefore submit to that which is no indignity at all, and must produce his authority in writing if requested to do so. If, however, he does not produce it when requested, he cannot at that meeting represent the creditor. It is a matter for the Registrar to consider whether he will ask all solicitors or any particular solicitor in any particular case to produce the written authority; but there is not the smallest indignity in having to submit to the section. I think the case comes within the sub-section; and even supposing we have power to hear the application, our decision must in either view be against the applicants.

BAGGALLAY, L.J.—I am of the same opinion. A debtor against whom a receiving order has been made is bound under section 16 to submit a statement of his affairs to the official receiver. Then section 17 makes provision for the public examination of the debtor, and there are various species of questionings to which he may be subjected—namely, as to his conduct, dealings, and property. I think the absence of any reference in sub-section 4 of section 17 as to the employment of counsel or solicitor, when we find it in sub-section 5, has a bearing upon the question before us. I think, apart from any consideration of solicitor or counsel, that the sub-section has reference to the creditor himself, or his representative authorised in writing, who is to question the debtor. The solicitor here comes within the provisions of the sub-section, and the mere fact of his being a solicitor does not entitle him to question the debtor unless he has been authorised in writing to do so by a creditor who has tendered a proof. Even if the creditor himself had appealed against the refusal of the Registrar to allow the solicitor to question the debtor, I should have come to the same conclusion.

BOWEN, L.J.—I am of the same opinion. I do not differ from the view taken as to the construction of sub-section 4. I feel doubtful whether the solicitor can make this application; but I do not doubt that a solicitor can apply for a *mandamus* if he has been denied audience to which he is entitled. I am not, however, satisfied that this appeal falls within that class of case.

Appeal dismissed.

Solicitor—E. W. Williamson, for appellants.

BANKRUPTCY. 1885. May 21. } *In re* MAGEE; *ex parte* MAGEE.

Bankruptcy—Affidavit sworn Abroad—Consul — Certificate of Qualification of Person administering Oath—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 135, *schedule I. rules* 5 *and* 14—*Bankruptcy Rules*, 1883, *rule* 50.

Where an affidavit to be used in a Bankruptcy Court is sworn abroad before a person of whose qualification to administer oaths in the country where he resides the Court takes judicial notice, a certificate by a British minister, or British consul, or by a notary public, that the person administering the oath is qualified to do so, is not necessary.

At the first meeting of the creditors of the debtor, held on the 29th of April, 1885, a proof was tendered on behalf of John Magee for 3,408*l.* 18*s.*

The jurat of the affidavit in support of the proof was as follows:—

"Sworn at Paris, Republic of France, this 21st day of April, 1885. Before me,

FALCONER ATLEE,

Her Majesty's Consul at Paris."

[Consulate Seal.]

The chairman of the meeting, Mr. A. H. Wildy, one of the assistant official receivers, rejected the proof for voting, and ordered it to stand over, on the ground that the jurat did not appear to be in conformity with section 135 of the Bankruptcy Act, 1883, inasmuch as a consul is not a person qualified to administer an oath, and also that there was no certificate that the person administering the oath was qualified to do so.

John Magee now moved, by way of appeal from the decision of the assistant

official receiver, for an order that his proof might be declared to be, and be, admitted as a valid proof for voting; and that the resolutions purporting to have been come to at the first meeting of creditors might be declared invalid, and, if necessary, a new first meeting directed.

Herbert Reed, for the motion.—First, consuls and vice-consuls may administer oaths, and affidavits taken before them may be used in Courts in the United Kingdom—6 Geo. 4. c. 87. s. 20, and 18 & 19 Vict. c. 42. ss. 1 and 2. Secondly, 18 & 19 Vict. c. 42. s. 3, the Bankruptcy Rules, 1883, rule 50, and the Bankruptcy Act, 1883, s. 135, shew that it is unnecessary that a consul or vice-consul should be certified to be qualified to administer oaths, notwithstanding the provision at the conclusion of section 135 of the Bankruptcy Act, 1883. He cited *Ex parte Bird* (1).

The assistant official receiver ought not to have rejected the proof; he should have proceeded under rule 14 of the First Schedule of the Bankruptcy Act, 1883, and allowed the creditor to vote.

The creditor now only asks that his proof should be admitted, and that a meeting should be summoned under rule 5 of schedule I. to the Act.

Muir Mackenzie, for the official receiver, relied upon the express provision at the conclusion of section 135 of the Bankruptcy Act, 1883.

[CAVE, J.—The enactment in section 135 is expressly said to be "subject to general rules." The consul is qualified to administer oaths by 6 Geo. 4. c. 87, and 18 & 19 Vict. c. 42, and by rule 50 of the Bankruptcy Rules the Court is bound to take judicial notice of his seal and signature. Here the qualification depends on our own law, not on foreign law. That disposes of the whole matter. What is there for the Court to be further certified of?]

F. C. Willis, for the trustee appointed at the first meeting.

CAVE, J.—I am of opinion that in this case the proof was wrongly rejected. The Bankruptcy Act, 1883, by section 135, provides that, "subject to general rules, any affidavit to be used in a Bankruptcy Court may be sworn before any person authorised to administer oaths in the High Court;—or, in the case of a person who is out of the kingdom of Great Britain and Ireland, before a magistrate or Justice of the peace, or other person qualified to administer oaths in the country where he resides (he being certified to be a magistrate or Justice of the peace, or qualified as aforesaid by a British minister, or British consul, or by a notary public)." Now, in this case the affidavit for proof of debt is sworn before the British consul at Paris, who by 18 & 19 Vict. c. 42 is a person qualified to administer an oath. Now, by rule 50 of the Bankruptcy Rules, 1883, "the Court shall take judicial notice of the seal or signature of any person authorised by or under the Act to take affidavits." Therefore the Court is bound to know that this is the signature and seal of the consul. What more is to be done? It is said that there must be a certificate in accordance with the concluding words of section 135. But here the qualification depends upon the statute 18 & 19 Vict. c. 42. I am bound, therefore, to know that the consul is qualified, and I am bound to recognise his seal and signature. This is not a case where the qualification is one of which I have no knowledge, and of which I must, consequently, require to be certified. If the contention of the official receiver were right, the consul would himself have to certify that he was a person qualified to administer an oath. The provision in section 135 seems intended to meet a case where the person qualified to administer an oath is so qualified by foreign law. That is, of course, a matter that one requires to be certified of. But when the affidavit is sworn before the consul himself, who by statute is qualified to administer oaths, it would be absurd to require a certificate.

I am asked further to say that the assistant official receiver should have acted under rule 14 of the Bankruptcy Rules and admitted the creditor to vote. But the assistant official receiver had not the advantage of hearing the able argument which I have listened to; and at the first

(1) 2 De Gex, M. & G. 963.

In re Magee; ex parte Magee, Bankr.

blush he might well have felt no doubt that a certificate was necessary. I cannot say, therefore, that he was wrong. All I say is, that when the chairman of a meeting is in doubt he should follow the rule.

The proper course will be, I think, not to give direction for a new meeting, but to leave the creditor to apply for the purpose. Subject to this, the motion must be granted, with costs of all parties out of the estate.

Order accordingly.

Solicitors—Rundle & Hobrow, for applicant; Woulfe, for trustee; W. A. Aldridge, for official receiver.

[IN THE COURT OF APPEAL.]

1885. March 24, 26. April 1.

CHADWICK *v.* BALL.*

Prohibition—Salford Hundred Court—Jurisdiction—Salford Hundred Court of Record Act, 1868 (31 & 32 *Vict. c.* cxxx.), *s.* 7.

A defendant in an action in the Salford Hundred Court who has not objected to the jurisdiction of that Court in his defence, as provided by section 7 of the Salford Hundred Court of Record Act, 1868, *cannot, after judgment has been recovered against him in that Court, obtain a writ of prohibition on the ground of want of jurisdiction.*

Oram *v.* Brearey (46 Law J. Rep. Exch. 481; Law Rep. 2 Ex. D. 346) *overruled.*

Appeal by the plaintiff from a decision of the Divisional Court.

Action to recover 12*l.* 4*s.* 6*d.* for commission brought by the plaintiff in the Salford Hundred Court. At the time of the accruing of the cause of action and of the issuing of the writ the defendant resided and had his place of business within the municipal borough of Oldham. The County Court of Lancashire, held at Oldham, had cognisance of and jurisdiction over the alleged cause of action under an Order in Council of the 31st of December, 1878, made under 15 & 16 Vict. c. 54. s. 7, whereby it was ordered that from the 1st of January, 1879, the whole of the municipal borough of Oldham should be excluded from the jurisdiction of the Salford Hundred Court, and that the said Court should cease to exercise any jurisdiction within the limits of the said borough in all cases whereof the County Court hath cognisance.

The defendant entered an appearance to the writ, but did not object to the jurisdiction of the Salford Hundred Court in his defence. The parties proceeded to trial, and the plaintiff obtained a verdict and judgment for the amount claimed.

The defendant then took out a summons at chambers for a writ of prohibition on the ground that the Salford Hundred Court had no jurisdiction, and Wills, J., gave leave for the writ to issue.

The Divisional Court (Lord Coleridge, C.J., and Manisty, J.) affirmed the decision of the Judge at chambers.

The plaintiff appealed.

Ambrose, Q.C., and *Woodard*, for the plaintiff.—The defendant relies upon 15 & 16 Vict. c. 54. s. 7, and on the Order in Council of the 31st of December, 1878, which excludes Oldham from the jurisdiction of the Salford Hundred Court; but that Court was created in 1868 by the Salford Hundred Court of Record Act, 1868 (31 & 32 Vict. c. cxxx.), so that it was not in existence when 15 & 16 Vict. c. 54 was passed, and the provisions of that Act are limited to Courts which were in existence in 1852. The decisions on the Mayor's Court Procedure Act (20 & 21 Vict. c. clvii.) may perhaps be considered applicable to the Salford Hundred Court of Record Act; but section 7 (1) of the latter Act is wider in its terms than the analogous provisions of section 15 of the Mayor's

* *Coram* Baggallay, L.J., and Lindley, L.J.

(1) 31 & 32 Vict. c. cxxx. s. 7: "No defendant shall be permitted to object to the jurisdiction of the Court otherwise than by special plea, and if the want of jurisdiction be not so pleaded the Court shall have jurisdiction for all purposes."

Court Procedure Act, for it provides in express terms that if the want of jurisdiction be not specially pleaded the Court is to have jurisdiction for all purposes. The case of *Manning* v. *Farquharson* (2) has never been overruled, and it was approved of in the judgment of the Exchequer Chamber in *Cox* v. *The Mayor of London* (3). The case of *Jacobs* v. *Brett* (4) is distinguishable, for there the prohibition was applied for before the time for pleading had arrived. The case of *Oram* v. *Brearey* (5) was wrongly decided, and the defendant is now estopped from saying that the Salford Hundred Court had no jurisdiction to try the action. *Baker* v. *Clark* (6) and *Jones* v. *James* (7) were also referred to.

Henn Collins, Q.C., and *Agabeg*, for the defendant.—The Salford Hundred Court had no jurisdiction to try the action. *Manning* v. *Farquharson* (2) and *Baker* v. *Clark* (6) are no longer authorities. *Baker* v. *Clark* (6) was discussed but not followed in *Bridge* v. *Branch* (8), whilst *Manning* v. *Farquharson* (2) is practically overruled by *Cox* v. *The Mayor of London* (3). *Oram* v. *Brearey* (5) is an authority in favour of the defendant to shew that he is entitled to a prohibition. Section 7 of the Salford Hundred Court Act does not give that Court jurisdiction in express terms; it merely deals with the procedure of the Court, and does not in any way oust the jurisdiction of the superior Court to prohibit the inferior Court where that Court has no jurisdiction at all to entertain the action. *Worthington* v. *Jeffries* (9) shews that the defendant can under the circumstances obtain a prohibition. The corresponding section 15 of the Mayor's Court Procedure Act provides that no defendant shall be permitted to object to the jurisdiction by any proceeding whatsoever except by plea, and this would also include proceedings by prohibition; but the question is whether the concluding words of section 7 of the Salford Hundred Act make any substantial difference. It was never intended to enlarge the jurisdiction of the Salford Hundred Court, and the words of the section have not done so.

Ambrose, Q.C., replied.

BAGGALLAY, L.J.—In my opinion this case is entirely governed by section 7 of the Salford Hundred Court of Record Act, 1868. I give no opinion as to how the case would have stood if the proceedings had been under the provisions of the Mayor's Court Act which have been cited. It seems to me that there is a marked distinction between the language of these two Acts. The Salford Hundred Court Act was passed after judgment had been delivered in *Cox* v. *The Mayor of London* (3), and the general effect of that decision was that whatever might be the position of the defendant so far as the proceedings were concerned, a stranger might come forward and apply for a prohibition although there is no plea to the jurisdiction. At that time there was a provision in force in the Mayor's Court to the effect that a defendant could not object to the jurisdiction except by plea. The first part of section 7 of the Salford Hundred Court Act repeats almost the same words as those contained in the Mayor's Court Act, but then additional words are added, upon which I think the present case turns. The latter words of the section cannot, in my opinion, have been intended merely to have the same effect as the earlier words, and therefore, according to the established rules of construction, and bearing in mind the decision given in *Cox* v. *The Mayor of London* (3), some further meaning must be attributed to them. The words of the section are that, if the want of jurisdiction be not pleaded, "the Court shall have jurisdiction for all purposes." No distinction is there drawn, so far as regards the right to proceed in prohibition, between a stranger and a party to the suit. The section gives the Court jurisdiction for all purposes, and meets the case exactly, and also the distinction pointed out by Mr. Justice Willes in *Cox* v. *The Mayor of London* (3). It

(2) 30 Law J. Rep. Q.B. 22.
(3) 36 Law J. Rep. Exch. 225, 231; Law Rep. 2 H.L. 239.
(4) 44 Law J. Rep. Chanc. 377; Law Rep. 20 Eq. 1.
(5) 46 Law J. Rep. Exch. 481; Law Rep. 2 Ex. D. 346.
(6) Law Rep. 8 C.P. 121.
(7) 19 Law J. Rep. Q.B. 257.
(8) Law Rep. 1 C.P. D. 633.
(9) 44 Law J. Rep. C.P. 209; Law Rep. 10 C.P. 379.

therefore seems to me that the section, where a defendant has not pleaded to the jurisdiction, has conferred jurisdiction upon the Salford Hundred Court for all purposes; and the defendant having taken the chance of judgment being given in his favour, cannot, when judgment is given against him, afterwards object and apply for a prohibition. The case of *Oram* v. *Brearey* (5) was referred to by Mr. Collins, and there he raised the contrary contention to that raised here; but after a careful consideration of the judgment of Mr. Baron Pollock in that case, I cannot concur in it. I think that the argument of Mr. Collins in that case ought to have prevailed. The decision of the Court below in this case must therefore be reversed. Sir James Hannen, who was present during a portion of the argument, agrees with the view which we have taken.

LINDLEY, L.J.—I am of the same opinion. The main question is, whether the defendant who was sued in the Salford Hundred Court, and did not plead to the jurisdiction, but took his chance of judgment being given against him, can now at the eleventh hour apply for a prohibition. I do not think it has ever been absolutely decided that a defendant could in circumstances like the present obtain a prohibition, although certain expressions used in *Worthington* v. *Jeffries* (9) certainly seem to go that length. It is not, however, necessary to decide that question, for here we have safer ground to go upon. Section 7 of the Salford Hundred Court Act is divisible into two parts: the first part of which provides that no defendant shall be permitted to object to the jurisdiction of the Court "otherwise than by special plea." If the section had stood there, the words would have been the same as those contained in section 15 of the Mayor's Court Act, upon which a construction has been placed by the House of Lords in *Cox* v. *The Mayor of London* (3); but then section 7 goes on to say that "if the want of jurisdiction be not so pleaded, the Court shall have jurisdiction for all purposes." It is impossible for the defendant to take advantage of the want of jurisdiction in arrest of judgment, or on a plea of the general issue or otherwise, for the first part of the section makes provisions for such matters. Then comes the second part of the section, and some effect must be given to it beyond that given to the words in the earlier part of the section. The language is peculiar—namely, that the Court shall have jurisdiction for all purposes. It was truly said by Mr. Baron Pollock in *Oram* v. *Brearey* (5) that the jurisdiction of the superior Court is not to be ousted except by express words. But how can it be said here that the inferior Court is exceeding its jurisdiction when the Act of Parliament says that, unless the objection to the jurisdiction is taken by plea, the Court shall have jurisdiction for all purposes? The superior Court has the right to prohibit where the inferior Court is exceeding its jurisdiction; but the words of section 7 extend the jurisdiction of the Salford Hundred Court. The provision is a reasonable one, and the substance of it is that the defendant shall not be permitted to take his chance of judgment being given against him in the inferior Court, and then be able to object to the jurisdiction. The appeal must therefore be allowed.

Appeal allowed.

Solicitors—J. E. Lambert, agent for W. Harris, Manchester, for plaintiff; Johnson & Weatherall, agents for C. Clegg, Oldham, for defendant.

[IN THE COURT OF APPEAL.]

1884. Dec. 2. THE LANCASHIRE AND CHESHIRE TELEPHONE EXCHANGE COMPANY (LIMITED) *v.* THE OVERSEERS OF MANCHESTER.*

Poor — Rate — Rateable Occupation — Telephone Company—Overhead Wires supported by Houses.

[For the report of the above case, see 54 Law J. Rep. M.C. 63.]

1885. April 27. } WELDON v. NEAL.

Habeas corpus ad testificandum — Prisoner—Litigant in Person imprisoned —44 Geo. 3. c. 102—Party to a Motion.

Pending the argument of a case in the Court of Appeal, the appellant, who proposed to appear and argue in person, was sentenced to imprisonment in respect of a charge of libel:—Held, *affirming the decision of* POLLOCK, B., *that the Court had no power under the circumstances to award a writ of habeas corpus to bring the appellant before the Court with a view to her arguing her appeal, as the provisions of* 44 *Geo.* 3. *c.* 102 *had no application to such a case.*

Appeal from the decision of Pollock, B., at chambers, refusing to award a writ of *habeas corpus* to bring the appellant before the Court of Appeal with a view to her conducting her case in person. The circumstances of the case were that the applicant, after having entered her appeal in a matter of *Weldon* v. *Neal*, was tried and sentenced to a term of imprisonment on a charge of libel, and as her case would come on for hearing in the Appeal Court during the period of her imprisonment, she applied as above stated to Pollock, B., for a writ of *habeas corpus* to enable her to argue it.

Rose Innes (with him *F. C. Philips*), for the appellant.—This is an application under 44 Geo. 3. c. 102 (1) for a *habeas corpus*.

[MANISTY, J.—That Act only applies to a *habeas corpus ad testificandum*. Here the application is not for the purpose of enabling the appellant to give evidence, but to conduct her case in person.]

The Attorney-General v. *Fadden* (2) shews that the operation of the Act is not limited to cases of persons giving evidence. In that case the applicant was only to sit in Court and be identified. *The Attorney-General* v. *Cleave* (3), *Cobbet's Case* (4), and *Clark* v. *Smith* (5) are authorities to shew the Court has a discretionary power.

[MANISTY, J.—*Benns* v. *Mosley* (6) is conclusive, and is an authority binding on this Court.]

R. H. Simonds, for the respondent, was not called upon.

GROVE, J.—The case of *Benns* v. *Mosley* (6) is quite clear and conclusive. It was decided after consultation between the Judges of the Queen's Bench, Exchequer, and Common Pleas. The appeal must be dismissed.

MANISTY, J., concurred.

Appeal dismissed.

Solicitors—John Hughes, for plaintiff; Defendant in person.

(1) 44 Geo. 3. c. 102: "Whereas it is expedient for the more effectual administration of justice in those parts of the United Kingdom of Great Britain and Ireland called England and Ireland that further provisions should be made for the issuing of writs of *habeas corpus ad testificandum* in certain cases: Be it therefore enacted, that from and after the passing the Act, it shall be lawful for any Judge of his Majesty's Courts of King's Bench or Common Pleas of England and Ireland respectively, or any Baron of his Majesty's Court of Exchequer of the degree of the coif in England, or any Baron of his Majesty's Court of Exchequer in Ireland, or any Justice of oyer and terminer or gaol delivery, being such Judge or Baron as aforesaid, at his discretion, to award a writ or writs of *habeas corpus* for bringing any prisoner or prisoners detained in any gaol or prison before any of the said Courts or any sittings of *nisi prius*, or before any other Court of record in the said parts of the said United Kingdom, to be there examined as a witness or witnesses, and to testify the truth before such Courts or any grand, *petit*, or other jury, in any cause or causes, matter or matters, civil or criminal, whatsoever, which now are or hereafter shall be depending or to be enquired into or determined in any of the said Courts."

(2) 1 Price, 403.

(3) 2 Dowl. P.C. 668.

(4) 3 Hurl. & N. 155; 27 Law J. Rep. Exch. 199.

(5) 3 Com. B. Rep. 984.

(6) 2 Com. B. Rep. N.S. 116.

1885. May 19. BARLOW v. TEAL.

Landlord and Tenant—Yearly Tenancy—Agreement for Six Months' Notice to quit—Agricultural Holdings Act, 1883 (46 & 47 *Vict. c.* 61), *s.* 33.

A yearly tenancy where the parties have expressly agreed for a six months' notice to quit is not within the Agricultural Holdings Act, 1883, *section* 33, *which enacts that "where a half-year's notice, expiring with a year of tenancy, is by law necessary and sufficient for determination of a tenancy from year to year, a year's notice so expiring shall, by virtue of this Act, be necessary and sufficient for the same."*

Appeal from an order by a Judge at chambers giving the plaintiff leave to sign final judgment under Order XIV.

The action was by a landlord against his tenant to recover possession of a farm. The tenancy was under a written agreement "for one whole year from the 6th of April, and so on from year to year until six months' notice shall have been given by one of the parties in the usual way." The tenant had received six months' notice on the 22nd of August to quit at Lady Day next ensuing, but he refused to go out on the ground that he was entitled to twelve months' notice under section 33 of the Agricultural Holdings Act, 1883 (1). The Master and a learned Judge at chambers having given the plaintiff leave to sign final judgment for possession of the land described in the indorsement on the writ,

The defendant now appealed.

C. Dodd, for the defendant.—The tenant is entitled to a year's notice under the Act; "six months' notice in the usual way" means half a year's notice. A six months' notice to determine a yearly tenancy means a "customary six months"—that is, six calendar months, which is equivalent to half a year—*Morgan* v. *Davies* (2). The Act is intended to apply, and the half year must be taken to be the ordinary and usual half year, which is identical with the six months stated in the agreement. *Wilkinson* v. *Calvert* (3) is not in point, as it was decided under the former Act, which did not apply to agreements in writing. Either the "six months' notice" here means calendar months, or customary six months, which in either view must mean half a year.

D. Kingsford, for the plaintiff.—The contract is express, and the Act does not apply. Had the agreement provided for half a year's notice, or had it been silent as to notice, the Act would have applied; but as the agreement has provided for six months' notice, which *prima facie* means lunar months—*The Queen* v. *The Inhabitants of Chawton* (4)—the Act has no application. It has, moreover, been decided that a six months' notice is not a half year's notice—*Doe* d. *Flower* v. *Darby* (5).

C. Dodd, in reply.

LORD COLERIDGE, C.J.—Whatever may have been the intention of the Agricultural Holdings Act, 1883, we can only decide this case on general principles, and one general principle affecting the construction of an Act of Parliament is that wherever a term which has received judicial construction is introduced into an Act it is intended by Parliament to be used in the same sense. I find that the point whether a six months' notice is the same as half a year's notice was brought before me in *Wilkinson* v. *Calvert* (3), where, considering myself bound by previous cases which had decided that the two things were not the same, I held that where an Act of Parliament had used the expression "half a year," something dif-

(1) 46 & 47 Vict. c. 61 (the Agricultural Holdings Act, 1883), section 33: "Where a half year's notice, expiring with a year of tenancy, is by law necessary and sufficient for determination of a tenancy from year to year, in the case of any such tenancy under a contract of tenancy made either before or after the commencement of this Act, a year's notice so expiring shall by virtue of this Act be necessary and sufficient for the same, unless the landlord and tenant of the holding, by writing under their hands, agree that this section shall not apply, in which case a half year's notice shall continue to be sufficient. . . ."

(2) Law Rep. 3 C.P. D. 260.

(3) 47 Law J. Rep. C.P. 679; Law Rep. 3 C.P. D. 360.

(4) 1 Q.B. Rep. 247; 10 Law J. Rep. M.C. 55.

(5) 1 Term Rep. 159.

ferent from "six months" was intended. The point now before us resolves itself into the question whether a tenancy determinable by "a six months' notice given in the usual way" is a tenancy to which "half a year's notice, expiring within a year of tenancy, is by law necessary." If it be so, then the plaintiff is not entitled to this order because he has not given the defendant half a year's notice; if the contrary, then the plaintiff is entitled to the order because the Act does not apply. It appears to have been clearly decided by cases which we have no authority to overrule that a six months' notice is not the same as half a year's notice, and consequently parties who have agreed to a six months' notice have not agreed to the notice to which section 33 applies. In *Doe* d. *Flower* v. *Darby* (5) Mr. Justice Buller—who I need not say was a very great lawyer—says: "An annual rent is here reserved, and upon such a holding it has been determined that half a year's notice to quit is necessary. This doctrine was laid down as early as in the reign of Henry VIII." He then goes on to say: "This gives rise to another objection in this case, upon the distinction between six months and half a year. The case in the Year Books requires half a year's notice; but here there is less than half a year's notice, and therefore it is bad on that ground also." It therefore appears that, certainly as far back as the time of Lord Mansfield, and apparently in the view of lawyers ever since, it has been held that a six months' notice is not a half year's notice. Consequently this agreement for a six months' notice is not a notice to which the Agricultural Holdings Act applies; the tenant is not entitled to a year's notice. In my judgment, therefore, the order appealed from must be affirmed.

FIELD, J.—I am of the same opinion, and I have the satisfaction of being in a position to speak unreservedly of the previous decision of *Wilkinson* v. *Calvert* (3), and to say that in my judgment that case was rightly decided. By a contract made before the Agricultural Holdings Act, 1883, the landlord has agreed with his tenant that a six months' notice to determine the tenancy should be given. The six months' notice has been given, but the tenant contends that the contract has been altered by subsequent legislation, and that he is entitled to a year's notice by virtue of section 33 of the Agricultural Holdings Act, 1883. It is true that the section applies to contracts whether made before or after the commencement of the Act, but the section is limited to those cases where a half-year's notice is by law necessary to determine the tenancy. Where, for instance, parties have made a contract of tenancy without any mode of determining the tenancy, in such a case a half-year's notice is by law necessary—*Doe* d. *Flower* v. *Darby* (5). There is a substantial difference between half a year's notice and a six months' notice; the former expires at known times, whereas a six months' notice may expire at any time. Under these circumstances I feel no difficulty in holding that the learned Judge at chambers was right and that his order must be affirmed.

Order affirmed.

Solicitors—Bowlings, Foyer & Hodern, for plaintiff; Pitman & Sons, agents for Thomas Sykes, Harrogate, for defendant.

[IN THE COURT OF APPEAL.]

1885. Feb. 24, 25. THE QUEEN (*on the prosecution of* JOHN ABBOTT) *v.* THE COMMISSIONERS OF SEWERS FOR THE LEVELS OF FOBBING.

Sewers, Commission of — Sea Wall — Frontager — Liability to repair ratione tenuræ—Extraordinary Storm—Burden of Proof—Order for Costs of Repairs—Commissioners—Owners of Back Lands—Interest in subject-matter.

[For the report of the above case, see 54 Law J. Rep. M.C. 89.]

BANKRUPTCY. 1885. May 19. } *In re* HEWITT; *ex parte* HEWITT.

Bankruptcy Act, 1883 (46 & 47 *Vict.* c. 52), *ss.* 27 *and* 125—*Bankruptcy Rules*, *rule* 28—*Person dying insolvent*—*Administration in Bankruptcy of Estate*—*Discovery*—*Order for Examination of Debtor's Widow.*

Where an order has been made for the administration of the estate of a deceased person according to the law of Bankruptcy under 46 & 47 *Vict.* c. 52. *s.* 125, *the Court has no power, either under section* 27 *of that statute, or rule* 58 (*Bankruptcy Rules*, 1883), *to order the attendance of witnesses for examination for the purpose of discovery of the deceased's property.*

This was an appeal from an order of the Dewsbury County Court made on the 10th of March, 1885, whereby it was ordered that Hannah Hewitt and Walter Hewitt should be committed to the prison at Wakefield for contempt of Court.

The appellant, Mrs. Hewitt, was the widow, executrix, and sole legatee of Richard Hewitt, and Walter Hewitt was one of his sons. The testator died on the 10th of September, 1883, and his will was proved on the 23rd of the following month. On the 5th of September, 1884, an administration order was made on the petition of creditors under section 125 of the Bankruptcy Act, 1883, and shortly afterwards all books, papers, and documents relating to the estate were handed to the official receiver.

On the 24th of January, 1885, the official receiver applied to the Court for an order for the examination upon oath before the Court of Hannah Hewitt, the widow of the deceased, and of Walter Hewitt, a son of the said deceased, upon the grounds that they were capable of giving information respecting the property of the deceased, and that such examination was necessary for the purposes of justice and for the discovery of the deceased's property.

Upon the above application Hannah and Walter Hewitt were ordered to attend the Court for examination on the 25th of February, 1885, and it was in consequence of their having failed to do so that the order now appealed against was made.

Herbert Reed, for the appellants.—The real object of the proposed examination was discovery, and there is no power, either under the provisions of the Bankruptcy Act, 1883, or the Bankruptcy Rules, to order such an examination in a case like the present. It will be contended for the official receiver that an examination of the appellants could be ordered under sections 27 and 125 of the Bankruptcy Act, 1883, and under rule 58 of the Bankruptcy Rules (1). The 27th section, which empowers an examination, is confined to cases where "a receiving order has been made against a debtor," and there is nothing in the Act which makes a "receiving order" and an "administration order" correlative terms. Section 125 creates a complete code for the administration in bankruptcy of the estates of deceased insolvent debtors, and by sub-section 11 "general rules for carrying into effect the provisions of this section may be made, in the same manner and to the like effect and extent as in bankruptcy." Sub-section 6 of section 125 makes applicable to cases where there is an administration order "the provisions of Part iii. of the Act." Now, the provisions of Part iii. commence at section 37, and, according to the ordinary rules of interpretation, the Legislature could not have intended to make applicable to a case like the present the provisions in the 27th section relating to the discovery of a debtor's property. If the Legislature had so intended, nothing would have been easier than to have enacted at the close of section 27 that a "receiving order" should be deemed to include an "administration order," as has been done in section 42, which gives a landlord power to distrain for one year's rent "due prior to the date of the 'order of adjudication,'" and where it has been expressly provided by sub-section 2 that "for the purposes of this section the term 'order of adjudication' shall be deemed to include an order for the administration of

(1) These and other material sections of the Bankruptcy Act, 1883, are set out *in extenso* in Cave, J.'s judgment.

the estate of a debtor whose debts do not exceed fifty pounds, or of a deceased person who dies insolvent."

If section 27 does not empower the Court to make an order for the appellants' examination, no rule can confer this power without extending the jurisdiction of the Court contrary to the provisions of section 127, sub-section 4. But rule 58 was borrowed from Order XXXVII. rule 5 of the Rules of Court, 1883, and was obviously intended only to admit of an order being made for the examination of a witness in a matter then pending, "where it shall appear necessary for the purposes of justice."

He cited *Warner* v. *Mosses* (2) and *Ex parte Willey; in re Wright* (3).

Muir Mackenzie, for the official receiver. —The broad question here is whether there was jurisdiction to make an order for the examination of the appellants under the Bankruptcy Act, 1883, or the rules issued thereunder. It is submitted that there was power to make such an order, either under rule 58 or section 27 of the statute. As regards rule 58, section 125, sub-section 11 gives power to make general rules, which need not be a separate code to those framed under section 127, and the above-mentioned rule is a rule which applies to the procedure under section 125. Admitting that the attendance of the appellants is required for the purpose of discovery, the 58th rule gives power to order such attendance. The objection that the rule so construed extends the jurisdiction of the Court cannot prevail, for rule 58 is borrowed from the Rules of the High Court, and the Court of Bankruptcy has all the powers of the High Court.

Again, section 27 confers full power to make the order now appealed against. It is said that the special mention of Part iii. in section 125, sub-section 6, shews that Part ii. is not to be applied to those proceedings. But sub-section 5 directs the official receiver "to realise and distribute" the debtor's estate in accordance with the provisions of the Act; and inasmuch as section 27 is part of the machinery of distribution, it must be taken as incorporated into the provisions dealing with the administration of the estates of persons dying insolvent. In other words, section 27 must be deemed to include cases where an order for administration has been made under section 125.

H. Reed replied.

CAVE, J.—In this case an order has been made for the administration of the estate of the deceased, Richard Hewitt, in bankruptcy, pursuant to section 125 of the present Act; and that order having been made, the official receiver subsequently applied for an order that the executrix and the son should attend and be examined. The learned County Court Judge made the order, and subsequently made an order for the committal of the proposed witnesses for not attending in pursuance of the original order. The question for us is whether he had jurisdiction to make those orders. Now, it is said there is jurisdiction to make them under rule 58 of the general rules of the Bankruptcy Act; and that if there is not jurisdiction under rule 58, there is jurisdiction under section 27 of the Act. As I gather, the orders have been made under rule 58, being the rule which the County Court Judge thought was applicable to this particular case. Now rule 58 is in these terms: "The Court may, in any matter where it shall appear necessary for the purposes of justice, make an order for the examination upon oath before the Court, or any officer of the Court, or any other person, and at any place, of any witness or person, and may empower any party to any such matter to give such deposition in evidence therein on such terms (if any) as the Court may direct." Now, that substantially corresponds with Order XXXVII. rule 5 of the present Rules under the Judicature Act, and it is contended that that rule empowers the Court, in any matter where there is no contentious litigation in progress, to order a person to attend and be examined for the purposes of discovery.

Now, I am of opinion that rule 58 has no such operation. When one comes to look at Order XXXVII. rule 5, from

(2) 50 Law J. Rep. Chanc. 28; Law Rep. 16 Ch. D. 100.

(3) 52 Law J. Rep. Chanc. 546; Law Rep. 23 Ch. D. 118.

which rule 58 has been taken, it is found forming part of an order relating not to discovery, but to evidence generally. So far as discovery is concerned, the rules regarding it are to be found in Order XXXI.; and discovery can be obtained either by means of affidavits, or by compelling the production of documents to the parties to the suit, and from them alone. That is the provision relating to discovery. But when you come to evidence, Order XXXVII. provides in the first instance that witnesses are to be examined *viva voce*, unless it is otherwise ordered; and then rule 5 lays down the rule to be followed where it is thought necessary for the purposes of justice that an order for the examination of witnesses otherwise than *viva voce* at the trial should be made. Now, to my mind, it is quite impossible to read that rule, appearing where it does, without seeing that it applies merely to the examination of a witness for the purpose of obtaining his testimony in a matter which is in litigation between contesting parties. The whole scope of the Order is directed to the question of how testimony in an action, and for the purposes of an action, is to be obtained. That there must be an action and litigating parties appears to me to be very clearly shewn by that part of the Order which relates to perpetuating testimony commencing with rule 35. Now, rule 35 says, "Any person who under the circumstances alleged by him to exist becomes entitled upon the happening of any future event . . . . to any estate or interest in any property, real or personal, the right or claim to which cannot by him be brought to trial before the happening of such event, may commence an action to perpetuate any testimony which may be material for establishing such right or claim." Now, one would have thought, if there ever was a case in which it would be permissible to examine witnesses for the purpose of discovery, that that might be such a case; but rule 37 provides that "witnesses shall not be examined to perpetuate testimony unless an action has been commenced for the purpose." So that before you can examine witnesses for that purpose there must be an action, there must be litigating parties, and there must be also an opportunity given to the other side to appear and cross-examine the proposed witnesses. Now in *Warner* v. *Mosses* (2) the late Master of the Rolls, having to deal with Order XXXVII. rule 4 of the Rules of Court, 1875 (which substantially corresponds with the Order XXXVII. rule 5 of the present rules), says, "I do not intend to cut down the generality of its terms, but it is confined to cases in which it appears 'necessary for the purposes of justice.'" Now, it cannot be necessary for the purposes of justice to examine witnesses before the trial who can attend at the trial, and accordingly this rule of the Order has been used in the cases mentioned in Mr. Wilson's book where witnesses are going abroad, or who from age or illness or other infirmity are likely to be unable to attend the trial, and then they are examined *de bene esse* in the usual way; but to have such an order you must have evidence that the witness cannot attend the trial. I do not wish to confine the effect of this rule to the cases I have mentioned. It does extend, no doubt, as it says, to all cases where it shall appear "necessary for the purposes of justice." Now, it will be observed that the late Master of the Rolls does not suggest that there can be any case where it is necessary for the purpose of justice, unless there is litigation and a trial in contemplation, and some reason or other why the witnesses cannot be examined at the trial. He goes on to say, "Now, having said this much, I am not aware of any case where it can be necessary for the purposes of justice that witnesses should be examined *ex parte*. I do not say such a case cannot arise, but, as a general rule, a witness should not be examined *ex parte*." So much, therefore, for the view which the late Master of the Rolls took of a precisely similar rule under the old rules. I say "precisely similar," because, although undoubtedly under Order XXXVII. rule 5 of the present rules a witness can be examined not only before an examiner but also before the Court, that cannot in the slightest degree alter the construction of the rules, or extend the power of the Court so as to enable the Court to turn that which was intended merely for the purpose of obtaining testimony in a pending action into a power

to obtain discovery, not for the purpose of any pending action whatever, but to see whether there is ground for bringing an action in future against some, as yet, unascertained person. Now, to the same effect are the observations made by the same learned Judge in *Ex parte Willey; in re Wright* (3). Speaking of this power to examine a witness for the purpose of discovery, he says: "It is a power, not to summon a man as a witness, but to summon him for the purpose of discovery, and he is treated in a totally different way from a witness. You cannot ask a witness the questions you can ask a man summoned under section 96. There are certain cases, where a witness proves to be hostile to the person calling him, in which, by permission of the Court, you can cross-examine him and ask him questions somewhat similar to those which you can ask under section 96; but even then you cannot go so far as you can under this section in the shape of discovery. It is framed with a different view from that of compelling a man to give testimony. It is not testimony, but discovery emphatically which is its object. Now, that is a very grave power to entrust to any Court or any man, namely, power to summon any other man whom you suspect (for mere suspicion will do) to be capable of giving information, and to get any information from him, although that information may be extremely hostile to the interests of the man himself. It is a power which, so far as I know, is found nowhere except in bankruptcy and the winding-up of companies (which is a kind of bankruptcy); it is a very extraordinary power indeed, and it ought to be very carefully exercised." Now, it is certainly remarkable that the late Master of the Rolls should use language of that kind, if it be true, as has been contended, that Order XXXVII. rule 5 had given the same identical power of discovery to all Courts, and in all matters whatever. It appears to me that these considerations are quite sufficient to dispose of the contention that this is a power which can be exercised under rule 58. To my mind rule 58 is for a totally different purpose—that is to say, for the purpose of procuring beforehand, where necessary for the purposes of justice, that evidence which, as a general rule and in the absence of special circumstances, ought to be given at the trial; and it is a power which only exists where there is litigation actually commenced between definite persons, and where therefore there can be an examination, not *ex parte*, but with the other side at liberty to attend and put questions in cross-examination. It is also a strong remark that if this rule 58 contains the power which is suggested, section 27 has really no reason whatever for its existence.

Now I come to section 27, because it was contended that if the power does not exist under rule 58, at all events it exists under section 27. Now, section 125, with which we have primarily to deal, contains this provision (sub-section 6): "With the modifications hereinafter mentioned, all the provisions of Part iii. of this Act, relating to the administration of the property of a bankrupt, shall, as far as the same are applicable, apply to the case of an administration order under this section in like manner as to an order of adjudication under this Act." Therefore, there you have an express provision that the provisions of Part iii. of the Act, with the modifications there mentioned, shall apply to the administration in bankruptcy of an estate of a person dying insolvent. Sub-section 5, which immediately precedes it, does not really at all extend sub-section 6, because sub-section 5 says this:—"Upon an order being made for the administration of a deceased debtor's estate, the property of the debtor shall vest in the official receiver of the Court as trustee thereof, and he shall forthwith proceed to realise and distribute the same in accordance with the provisions of this Act." Now, the provisions with regard to realisation and distribution form a portion of the sections comprised in Part iii. of the Act. Part iii. begins with section 37, and extends to the end of section 65; the provisions with regard to realisation of property begin with section 50, and extend to section 57; and those with regard to distribution begin with section 58, and extend to section 65. So that sub-section 6 does really extend the provisions of sub-section 5, and makes not merely those provisions which I have

referred to of Part iii., but the whole of Part iii. applicable to the administration of the property of an insolvent debtor under an administration order. Now, when one turns to section 27, it is not within Part iii. of the Act at all, and it provides as follows: "The Court may, on the application of the official receiver or trustee, at any time after a receiving order has been made against a debtor, summon before it the debtor, or his wife, or any person known or suspected to have in his possession any of the estate or effects belonging to the debtor, or supposed to be indebted to the debtor, or any person whom the Court may deem capable of giving information respecting the debtor, his dealings or property, and the Court may require any such persons to produce any documents in his custody or power relating to the debtor, his dealings or property." But the sub-sections to which I have referred of section 125 do not apply to section 27, and I cannot say that they impliedly make it applicable. Consequently I think one is bound by *Willey's Case* (3), which is substantially similar to this, and one must have regard to the actual language of section 27; and, having regard to the actual language, it does not apply to a case in which an estate of an insolvent person is being administered in bankruptcy. It may be a very convenient thing that the official receiver in such a case should have the power contained in section 27; but what we have to see is that the Legislature has said either expressly or impliedly that he shall have that power. Looking at the principles laid down in *Ex parte Willey* (3), I come clearly to the opinion that no such power has been given by the Legislature. It was open to the Legislature at the time when, in section 125, it was provided by sub-section 6 that the provisions of Part iii. of the Act should apply, also to have provided that the provisions of section 27 should apply as well; but the Legislature has not done so. It has nowhere said that a receiving order is to be regarded as being the same thing as an administration order, or that a person known or suspected to have in his possession any estate or effects belonging to the debtor is to be regarded as if he were a person known or suspected to have in his possession any property belonging to a deceased person whose estate is being administered in bankruptcy. Now, as the Legislature has not chosen to say that, in my opinion we clearly cannot take upon ourselves to say it for the Legislature. We should be doing that very thing which the late Master of the Rolls in *Ex parte Willey* (3) says we ought not to do—we should be legislating, and not interpreting the Act.

For these reasons I think the order appealed against must be set aside.

WILLS, J.—I am of the same opinion, and have but little to add to the judgment of my brother Cave.

It seems to me that it is not inconvenient to approach this case in the reverse order, and to look to what the Act says; because I think a consideration of what the Act of Parliament says helps one to the meaning of rule 58, which was made under the Act of Parliament and intended to be ancillary to it.

Now, in the Act of Parliament provisions are made for administering insolvent estates upon different principles from those which regulate the administration and distribution of solvent estates. There does not seem to be any particular reason, when the necessary machinery is provided for carrying out the administration upon the altered principles, for clothing the Court which is to administer the insolvent estate with extraordinary powers which it does not possess in the case of the solvent estate. Accordingly, the Legislature does not seem to have done so, because by sub-section 6 they specifically point out the particular provisions of the Bankruptcy Act which they intend shall apply in order to work out the enactment that the insolvent estate shall be administered according to the principles of the law of bankruptcy. According to all ordinary interpretation, where it is specifically enacted that the provisions of a particular part of a statute shall apply, it is intended that the provisions of the other part of the Act shall not apply. Unless there is some cogent reason for departing from that almost universal canon of interpretation, it ought not to be departed from. But it has been contended that there are reasons for such a departure in the present

case. One of them is, that sub-section 5 of section 125 directs the official receiver of the Court, as trustee, to realise and distribute the property in accordance with the provisions of the Act; and it has been argued that inasmuch as section 27 was a part of the machinery of distribution, therefore that is to apply. Now, I think, when you come to look at Part iii. and find that it contains two groups of sections, one of which is headed "Realisation" and the other "Distribution," it is clear that section 125, sub-section 5, meant to speak of realisation and distribution in the sense which would be proper when the next sub-section was going to incorporate Part iii. of the Act, and that it really meant to point to that group of sections which are so headed in the Act. If that be so, there is no reason for going beyond Part iii.; and when we come to look at section 27 we could only apply it by rejecting the material part of the enactment, because the power is only given there at any time after a "receiving order" has been made against a debtor. It is impossible to satisfy these words in the case of an administration suit, because there is no receiving order, and Mr. Mackenzie is driven to say that there is something which will answer the same purpose. But the suggested method of interpretation is one which cannot be applied consistently with the language of the Act of Parliament. Here you have an Act of Parliament which has made, in special cases only, a departure from the principles upon which people are called upon to give testimony in Courts of justice. Again, the expression of one thing is, according to all ordinary rules of interpretation, the exclusion of that which goes beyond it, and the fact of the Legislature having made these special provisions in section 27 is a tolerably clear indication that legislation was wanted to introduce a new and exceptional principle and mode of action in such matters, and also that it was only in the cases provided by section 27 that such exceptional modes of dealing with witnesses were to be introduced and enforced. This consideration appears to me to throw light upon what is meant by rule 58, which was intended to carry out the Act. Now, if this rule went beyond the provisions of the Act, and introduced a new method of dealing with the rights and property of strangers by subjecting them to a new discipline which the Act of Parliament has not provided for, then it has, within the language of sub-section 4 of section 127, extended the jurisdiction of the Court, and is *ultra vires*. I do not think the rule has done so, but intended only to make supplemental provisions for the more easy working of the general power of the Court, as a Court, to get testimony, and subject to the general principles which regulate the admission of testimony. I think, therefore, that the argument that this order can be supported under rule 58 fails.

On the above grounds I am of opinion that the order in this case cannot be supported, and that this appeal must be allowed.

Appeal allowed, with costs.

Solicitors—Jaques, Layton & Jaques, agents for Scholefield & Son, Dewsbury, for appellants; Solicitors to the Board of Trade, for official receiver.

[IN THE COURT OF APPEAL.]

1885. June 3. TROWER (*executrix*) *v.* THE LAW LIFE ASSURANCE SOCIETY.*

Practice—Action—Trial by Judge with Jury—Order XXXVI. rules 4, 6, *and* 7.

A party who desires that an action shall be tried with a jury must obtain an order to that effect; and if the case falls within Order XXXVI. rule 6, *the Master has no discretion, but must make the order.*

Appeal from a decision of the Divisional Court.

The plaintiff, as executrix of her husband, brought this action against the defendants to recover on a policy alleged to have been bought by her husband. She took out a summons for an order to have the action tried with a common jury, but the Master dismissed the summons, indorsing upon it the words "No order."

* *Coram* Brett, M.R., Baggallay, L.J., and Bowen, L.J.

Trower v. *Law Life Assurance Society, App.*

The Divisional Court (Pollock, B., and Manisty, J.) affirmed the decision of the Master.

The plaintiff appealed in person.

J. M. Moorsom, for the defendants.—The main questions in the action are whether the husband was merely a bare trustee, and whether the Statute of Limitations was applicable. These are questions to be determined on the summons, and as the action could formerly have been brought either at Common Law or in the Court of Chancery, the case falls within Order XXXVI. rule 4, and the Master was therefore justified in refusing to make an order for the action to be tried with a jury. *Horn* v. *The Anglo-Australian Life Insurance Company* (1), and Order XXXVI. rule 6 were referred to.

BRETT, M.R.—We have consulted the other members of this Court, and they have justified our opinion that the present action is one which the Court of Chancery would not have entertained. The case, therefore, is not within rule 4 of Order XXXVI.; nor has it been shewn to fall within any of the excepted cases mentioned in that Order. But it is within rule 6; and, taking that rule together with rule 7, the result is that a person who has a right to have a case tried with a jury must get an order to that effect. But where such an application is made in a case which is not within any of the exceptions, the Master has no discretion, but must make an order for the action to be tried with a jury. The indorsement here of "No order" was therefore wrong, and the appeal must be allowed.

BAGGALLAY, L.J., and BOWEN, L.J., concurred.

Appeal allowed.

Solicitors—Walters, Deverell & Co., for defendants.

(1) 30 Law J. Rep. Chanc. 511.

1885. April 22, 23.

MELLISS AND ANOTHER *v.* THE SHIRLEY AND FREEMANTLE LOCAL BOARD OF HEALTH.

Public Health Act, 1875 (38 & 39 *Vict.* c. 55), *ss.* 174 *and* 193—*Local Government—Contract with Urban Authority for Amount exceeding* 50*l.*—*Contract not under Seal—Confirmation under Seal before Completion of Contract—Officer of Local Authority interested in Contract made with Local Authority—Validity of Contract.*

It is competent for an urban authority, honestly and for the advantage of their district, to confirm under their seal a previous contract not under seal for an amount exceeding 50*l. before such contract is completely executed, so as to render the contract valid within section* 174 *of the Public Health Act*, 1875.

A contract not under seal, made by an urban authority, whereof the value or amount in fact exceeds 50*l., is invalid by reason of section* 174 *of the Public Health Act*, 1875, *notwithstanding that at the time of entering into the contract it was uncertain what would be the value or amount of the contract when executed.*

Eaton *v.* Basker (50 Law J. Rep. Q.B. 444; Law Rep. 7 Q.B. D. 529) *distinguished.*

A contract made with a local authority is not rendered void under section 193 *of the Public Health Act*, 1875, *by reason that an officer or servant of the local authority is concerned or interested in the contract.*

Action tried in London before Cave, J., without a jury.

The claim was to recover 530*l.* 1*s.* 5*d.*, money payable by the defendants for work done, money paid, and expenses incurred for the defendants by the plaintiffs as engineers.

The facts as proved at the trial were, so far as material, as follows:—

The plaintiffs, John Charles Melliss and John Rose Pim, were civil engineers, and the defendants were an urban sanitary authority under the Public Health Act, 1875.

In 1881 the plaintiff Pim was appointed

surveyor to the defendants at a salary of 150*l.* per annum.

In 1882 the defendants, being about to carry out certain works of drainage in their district, entered into negotiations with the plaintiffs with a view to employing them as their engineers for that purpose; and on the 14th of November, 1882, the plaintiffs wrote to the defendants offering to act as their engineers for the drainage of Freemantle and for the disposal of the sewage of the defendants' district, and to prepare all the necessary plans and estimates, charging as their remuneration four per cent. on the total outlay, and further charging four guineas a day each for attending Local Government Board enquiries and Parliamentary work, if required, together with all out-of-pocket expenses, and the usual prices for copies of plans for the Local Government Board, and also charging one and a half per cent. on the total outlay for taking out quantities and lithographing, and one and a half per cent. for printing—their accounts to be paid quarterly; and further, that in the event of Mr. Melliss having to attend meetings of the defendants at Shirley he would charge four guineas a day and out-of-pocket expenses.

The defendants accepted this offer, and on the 20th of November, 1882, the clerk to the defendants wrote to the plaintiffs signifying such acceptance; but no contract under the seal of the defendants was entered into.

Between November, 1882, and October, 1883, the plaintiffs, in pursuance of this arrangement, performed work and services for the defendants exceeding 50*l.* in amount.

In October, 1883, the plaintiff Melliss wrote to the defendants, stating that it was usual for agreements between local boards and engineers to be under seal, and enclosing the following memorandum of agreement, to which the defendants were requested to affix their seal:—

"Memorandum of agreement.—Whereas the Shirley and Freemantle Local Board of Health are about to carry out works for the drainage of Freemantle and for the disposal of the sewage of the combined district, and have, under date 14th November, 1882, received an offer from John Charles Melliss, civil engineer, of 232 Gresham House, London, E.C., and John Rose Hall Pim, civil engineer, of 61 Above Bar Street, Southampton, to act as their engineers for the same, and to prepare all the necessary plans and estimates, charging as their remuneration four per cent. on the total outlay, and further charging in addition four guineas a day each for attending Local Government Board enquiries and Parliamentary work, if required, as well as all out-of-pocket expenses, and the usual prices for copies of plans for the Local Government Board, and further charging in addition one and a half per cent. on the total outlay for taking out quantities and lithographing, and a further half per cent. for printing, their accounts to be paid quarterly: Further, that in the event of Mr. Melliss having to attend meetings of the local board at Shirley, he would charge, in addition, the sum of four guineas a day and out-of-pocket expenses: And whereas the said Shirley and Freemantle Local Board of Health did accept such offer, such acceptance being conveyed to Messrs. Melliss & Pim in a letter from W. Godfrey Newman, Esquire, clerk to the said board, under date 20th November, 1882, the seal of the said local board is, in confirmation of such agreement and contract, hereby attached this 2nd day of November in the year 1883 in presence of ."

The seal of the defendants was affixed to this memorandum on the 2nd of November, 1883, which fact was attested as follows:—

"The seal of the above-named urban authority was hereunto affixed at a meeting of the said authority by Henry Lewis, chairman of the board, in the presence of

"W. Godfrey Newman,
Solicitor, Southampton,
Clerk to the said Board."

The great bulk of the services in respect of which the action was brought were rendered by the plaintiffs prior to the 2nd of November, 1883, but a few items of the claim occurred after that date. In March, 1884, a new local board was elected, which decided to abandon the drainage scheme, and refused to pay the plaintiffs' account, and the plaintiffs commenced their action in October, 1884.

Melliss v. *Shirley Local Board.*

The defendants, without admitting any liability under their agreement with the plaintiffs, paid 200*l.* into Court.

Evidence was given as to the services rendered by the plaintiffs, and as to the reasonableness of their charges.

The facts and arguments in reference to the item of 62*l.* 8*s.*, part of the plaintiffs' claim, appear sufficiently from the judgment.

Meadows White, Q.C., and *Muir Mackenzie*, for the plaintiffs.

Charles, Q.C. (*F. O. Crump* with him), for the defendants, submitted that there must be judgment for the defendants. First, there is no contract under seal as required by section 174 of the Public Health Act, 1875—*Hunt* v. *The Wimbledon Local Board* (1) and *Young* v. *The Mayor &c. of Leamington* (2); and if the original contract is void, the alleged ratification under seal of the 2nd of November, 1883, is worthless—*The Ashbury Railway Carriage and Iron Company* v. *Riché*, *per* Lord Chelmsford (3).

[CAVE, J.—That was a contract which could not be made at all by the company. No formality whatever would have made the contract good, because it was *ultra vires*. The contract here was not *ultra vires* of the local board.]

If in law it was nothing, it cannot be ratified; you cannot ratify what does not exist.

[CAVE, J.—There is a great distinction between a case where a part of the work remains to be done, and where there is therefore a consideration in the agreement on the one side to complete the work for the promise on the other side to pay for the past and future work, to which promise the seal is affixed, and a case in which all the work contracted for has been done.]

In this case, when the seal was affixed, the whole work claimed for was done, except five items. To hold that this can be done, is to deprive the ratepayers of the benefit of this section. Secondly, Pim and Melliss were associated, and the contract is between the local board and its officer. Section 193 of the Public Health Act, 1875, says that an officer of a local authority shall not be concerned or interested in a contract made with such authority—that is to say, that he shall not be entitled to sue upon such contract.

[CAVE, J.—The section does not say that the contract shall be void. *Atkinson* v. *The Newcastle and Gateshead Water Company* (4), *Couch* v. *Steel* (5), and *Stevens* v. *Jeacocke* (6) were referred to.]

The words of the statute are prohibitory, and render the contract void—*Leake on Contracts*, ed. 1867, pp. 376, 377.

Muir Mackenzie replied.

CAVE, J.—This case is one of some little difficulty, and some rather important questions have been raised before me. Having, however, had time since yesterday to consider it, I am prepared at once to give my judgment on the points which have been raised.

The first question that was raised was that the plaintiffs were not entitled to recover at all, upon the ground that there was no contract under seal as required by the 174th section of the Act.

The facts are these. In November, 1882, it was contemplated that a very large sum of money would be laid out in draining a part of the defendants' district and improving the outfall of other parts of the district, and it was necessary under these circumstances to employ engineers of skill and experience to superintend works of such magnitude. Thereupon an arrangement, contained in letters of the 14th and 20th of November, 1882, was entered into with Messrs. Melliss & Pim, by which they were to do conjointly the engineering work, and they were to be paid at the rate of four per cent. upon the outlay, with certain special allowances for incidental matters which might or might not occur during the progress of the scheme. That arrangement having been made, a good deal of work of one kind or another was done by the

(1) 48 Law J. Rep. C.P. 207; Law Rep. 4 C.P. D. 48.
(2) 52 Law J. Rep. Q.B. 713; Law Rep. 8 App. Cas. 517.
(3) 44 Law J. Rep. Exch. 185, at p. 202; Law Rep. 7 H.L. 653, at p. 679.
(4) 46 Law J. Rep. Q.B. 775; Law Rep. 2 Ex. D. 441.
(5) 3 E. & B. 402; 23 Law J. Rep. Q.B. 121.
(6) 11 Q.B. Rep. 731; 17 Law J. Rep. Q.B. 163.

'iffs. But somewhere about No-
1883, it occurred, or was suggested,
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.d that offer in a letter from
.K of the 20th of November, 1882,
, that now, in confirmation of the agreement, the seal of the board was duly attached.

Now it seems to me, looking at the peculiar circumstances of the case, that there was on the 2nd of November, 1883, a perfectly good agreement, and one authenticated with the seal of the board. What took place as far as one could gather seems to have been this: the plaintiffs, as I have said, finding that they were not in possession of a contract under seal—and that consequently, while on the one hand they were not bound to proceed with their work as engineers, on the other hand they would not be entitled to any remuneration—appear to have gone to the board and made this arrangement with them:—"We will go on with our contract on the footing upon which we have been going on all along; we will do what there is left to do, if you will pay us according to the terms agreed upon, and will pay us as if the seal had been affixed in November, 1882." Now, whatever might be the result in point of law if the seal of the local board were not affixed until after the work was actually done (upon which I express no opinion, as it is not necessary that I should do so), it appears to me that while the contract is still open, and while it may fairly be contended that it was for the advantage of the local board that the contract should be carried out in its integrity, it is open to them, under that state of circumstances, to affix their seal to the contract, and that by so doing they render the whole contract good. If it could have been shewn to me that this document of the 2nd of November, 1883, was not entered into honestly with a view to the advantage of the district, but for the purpose simply of putting money into the pockets of the plaintiffs which they were not at that time in a position to get, possibly some difference might have followed in my decision. But no such case has been made out here; and I come to the conclusion that in point of fact the memorandum of agreement was honestly made by the board in the belief that under the peculiar circumstances in which they then were it was for the interest of the ratepayers that these gentlemen should continue to act as engineers; and it was for the benefit of the ratepayers, that although some portions of the work had been done, the plaintiffs should be paid for the work which had so been done upon the terms that they would on their part carry out the contract in its entirety. I come to the conclusion, in point of fact, that that was an honest and *bona fide* agreement entered into for the benefit of the ratepayers at a time when it was for the benefit of the ratepayers that the plaintiffs should be bound to carry out their agreement, and that consequently it is not open to the objection which has been raised. I come therefore to the conclusion that there is a good and binding agreement under seal of the board.

The second point made, which went to the whole case, was that Mr. Pim is an officer of the board, and that as such officer of the board he is forbidden by section 193 of the Act to be concerned or interested in any bargain or contract made with the local board for the purposes of the Act. Now, whether Mr. Pim does or does not fall within the scope of the section it is not necessary for me to consider at the present time, because I come to the conclusion that even if he does fall within the scope of the section, the section does not make the contract void. There is very little authority to be found upon the subject, but I think it may be taken that when the Legislature forbids that a thing shall be done you must look to the purview, as it is called, of the Act, and the surrounding circumstances, in order to see whether the effect of the Act is to make the doing of the thing forbidden unlawful, so that any contract in which that

thing exists as a part is rendered a void contract, or whether the Legislature intends that the penalty for doing the thing shall be confined to the penalty which is expressly declared in the Act as following upon the doing of that which is forbidden. Now, considerations of public utility are very usefully regarded when you come to consider whether the Legislature did or did not mean in such cases as these that the whole contract should be void. There is a case which has a slight, but not very great, bearing upon this—the case of *Foster* v. *The Oxford Railway Company* (7). That was a decision on the 85th section of the Companies' Clauses Consolidation Act (8 Vict. c. 16), which enacted that "no person holding an office or place of trust or profit under the company, or interested in any contract with the company, shall be capable of being a director." The question raised there was, whether the contract thereupon became void. Upon that question Chief Justice Jervis makes the following observations: "There is no doubt," he says, "that the mischief pointed out by Mr. Gray was that which moved the Legislature to make the provisions in question. But we cannot, in order to carry their intention more completely into effect, impose a larger penalty than they have thought proper to affix. The 85th section enacts that 'no person holding an office or place of trust under the company, or interested in any contract with the company, shall be capable of being a director; and no director shall be capable of accepting any other office or place of trust or profit under the company, or of being interested in any contract with the company, during the time he shall be a director.' Mr. Gray says that that section makes all contracts in which a director is interested void. The *quantum* of interest will not affect the question: if, therefore, all such contracts be void" (and this is the part to which I desire to call particular attention), "contracts entered into with a joint stock company, as well as contracts entered into with individuals, would be avoided if a member of the joint stock company happened to be a director of the company contracted with." Partly upon the consequence that would result from such a construction, as well as also upon the actual words of the provision itself, the Court came to the conclusion that the only penalty imposed was that the director ceased to be a director, and that the contract was not void. Well now, the same result would follow in this case—that is to say, that if the contract is void it would follow that wherever there was a contract with a joint stock company, and any shareholder of that company was an officer of the board, the contract would be void. A contract of that kind has been held to be within the mischief of section 193 (8); and although in the case of a joint stock company the individual members of the company are not parties as such to the contract which the company makes, yet if the company makes a contract every shareholder is interested in that contract, because the profits which he reaps as a shareholder depend upon the accumulation of profits arising out of the contracts which the joint stock company enters into, and consequently a shareholder who was an officer of the local board would in such a case—as indeed has been held (8)—fall within the provision of section 193, and if the contract itself was void the consequences would be of the most serious possible character: the directors of any company could never contract with a local board without going carefully through the list of their shareholders in order to see whether any minor official of the board did or did not happen to hold some very small share in the company, with a penalty, if they made a mistake on that point, of not being able to sue at all for the value of the goods they had supplied or the services they had rendered to the company. These consequences are so tremendous, and the penalty is so altogether out of proportion to the offence committed, that I think it would require somewhat strong language on the part of the Legislature to bring one to the conclusion that they intended such a result as that. The interest of a shareholder being an official of the company might be almost infinitesimal, and yet,

(7) 13 Com. B. Rep. 200; 22 Law J. Rep. C.P. 99.

(8) *Todd* v. *Robinson*, *ante*, p. 47; Law Rep. 14 Q.B. D. 739.

because he happened to have that infinitesimal interest, the contract entered into by the joint stock company with the local board is to be void, and the local board are to get their gas, or their coals, or their water, or whatever else might be the subject-matter of the contract, for nothing—a tremendous punishment upon all the innocent members of the company for something which it is very difficult to see how they can prevent without putting upon them, as it seems to me, a very undue and very unnecessary amount of trouble. On the other hand, we find that the section does provide, in express terms, a penalty in case of non-compliance with its provisions. The officer is to be incapable of afterwards holding or continuing in any office or employment under the Act, and is also to forfeit and pay a sum of 50*l.* Now Mr. Charles says that the penalty may be utterly inadequate to the offence. Of course one may conceive cases in which it might be inadequate. But what one has to look at is not all possible and conceivable cases, but those which are likely to occur in practice, and which consequently the Legislature, composed of persons of business, would think it necessary to provide against; and when you look at the persons against whom the legislation is directed, officers or servants of the company—that is to say, such persons as surveyors, inspectors of nuisances, clerks to the board, and others—it does not seem very likely that they would ever be concerned in transactions with a local board of so important and extensive a character as to make the forfeiture of their office, and their being afterwards incapable of holding any office or employment under the Act, combined with the forfeiture of 50*l.*, an inadequate punishment. I am, therefore, of opinion that the effect of section 193 is not to make the bargain or contract void, but that the penalty for disobedience to the Act is that pointed out in the remaining part of the section.

That disposes of the two points which went to the whole claim made by the plaintiffs, and I have now, therefore, to consider their claim somewhat more in detail. The amount which they seek to recover is 530*l.* In the first instance, I must deduct from that a sum of 62*l.* 8*s.*, which, from the evidence of Mr. Melliss this morning, it appears forms no part of the memorandum of agreement. It was a special report which he was ordered to prepare some time before the memorandum of agreement was sealed. It is not included within the four per cent. certainly; nor is it included within any of the other things, any one of the extra matters with regard to which a special allowance is created by the memorandum. In fact, it is not within the memorandum in any way. It was a totally separate and special matter not contemplated by the memorandum of agreement. That being so, inasmuch as the sum charged amounts to 62*l.* 8*s.*, I am of opinion that that comes within the section which requires a contract under seal where the amount exceeds 50*l.*, and that consequently that sum cannot be recovered. It was contended ingeniously by Mr. Mackenzie that although the sum did amount ultimately to 62*l.* 8*s.*; yet at the time when the order was given for the special report to be made, it did not necessarily follow that the amount would be over 50*l.*, and consequently that no contract under seal was necessary; and he referred me on that point to the case of *Eaton* v. *Basker* (9), which was an action brought by a medical man against a local board where he had verbally agreed with the committee to attend patients at the rate of 5*s.* 3*d.* per tent per day. Now it is obvious that, according to the terms of that agreement, at the end of each day he was entitled to his 5*s.* 3*d.* per tent, and that if he were discharged, for instance, at the end of the day, or if the fever proved to be more tractable than it turned out to be, the sum to which he would be entitled would be considerably less than 50*l.*, and that in any event he would be entitled to recover a series of sums, none of them coming up to the sum of 50*l.* In this case, on the contrary, there is no evidence to satisfy me that it was ever contemplated that a special report would come to a less sum than 50*l.*, and there never was a period when the plaintiffs were entitled to sue for a less sum than 50*l.* The amount

(9) 50 Law J. Rep. Q.B. 444; Law Rep. 7 Q.B. D. 529.

which it came to was 62*l.* 8*s.*, and undoubtedly the proper course to have pursued, even assuming that in the outset it was supposed it might have amounted to less than 50*l.*, would have been, before the report was presented, for Mr. Melliss to have said, "I find that this comes to a sum exceeding the sum for which you are entitled to give an order verbally; I am not bound at this moment to let you have it, and before I give you this report, and you have the advantage of my skill, time, and labour, I must have from you a document under seal confirming the arrangement which we have entered into, and undertaking to pay me a sum of 62*l.* 8*s.*, which I find to be the value of my report." Unfortunately for him that was not done; and I come to the conclusion with regard to that sum that he is not entitled to recover.

[His Lordship went through the various items in the plaintiffs' accounts, and in the result found in the plaintiffs' favour for 378*l.*, being 178*l.* in addition to the sum paid into Court, and gave judgment for the plaintiffs for that amount with costs.]

Judgment for plaintiffs for 178*l. beyond the amount paid into Court, with costs* (10).

Solicitors—Keen, Rogers & Co., for plaintiffs; Speechley, Mumford & Co., agents for Lamport & Trimnell, Southampton, for defendants.

(10) Compare *Barton* v. *Piggott*, 44 Law J. Rep. M.C. 5; Law Rep. 10 Q.B. 86.

[IN THE COURT OF APPEAL.]

1885. March 17. May 4. THE GAS LIGHT AND COKE COMPANY *v.* THE VESTRY OF ST. MARY ABBOTTS, KENSINGTON.*

Highways—Mode of Repairing—Gas Company, with Statutory Power to Lay Pipes under—Damage to Pipes—Power of Highway Authority—31 & 32 *Vict. c.* cvi., 23 & 24 *Vict. c.* 125, *s.* 62, 14 & 15 *Vict. c.* cxvi., 10 *Vict. c.* 34, 18 & 19 *Vict. c.* 120, *ss.* 25, 26, *and* 27.

The plaintiffs, a gas company, having statutory powers to place mains and pipes under the highways, and a statutory obligation to supply gas within the parish of K., laid, prior to 1872, *certain pipes under certain highways within the jurisdiction of the defendants, who, being the highway authority for the district, were, by virtue of* 10 *Vict. c.* 34, 18 & 19 *Vict. c.* 120, *and* 25 & 26 *Vict. c.* 102, *bound to repair the highways, and empowered to pave and alter the level of streets under their management. In* 1872 *the defendants began to use steam rollers of considerable weight for the purpose of repairing the highways, and thereby fractured certain pipes belonging to the plaintiffs laid under the highways:*—Held, *that the plaintiffs were entitled to an injunction restraining the defendants from using any steam rollers in such a way as to fracture or damage any pipes belonging to the plaintiffs which were properly laid under the highways within the jurisdiction of the defendants.*

Appeal from the judgment of Field, J., after trial without a jury, granting an injunction restraining the defendants the vestry, their servants, agents, and workmen, from using, or causing to be used, any steam or other roller in such a way as to fracture, damage, or injure the mains, pipes, or works of the plaintiffs.

The statement of claim alleged that the plaintiffs were a body corporate, originally incorporated by royal charter, and continued as a corporation by the Gas Light and Coke Company's Act, 1868;

* *Coram* Lord Coleridge, C.J., Sir J. Hannen, and Lindley, L.J.

that they were authorised and empowered to maintain gas works, and supply gas, and to place mains and pipes under the roads, streets, and highways within, amongst other districts, the parish of St. Mary Abbotts, Kensington; that certain mains and pipes were properly laid by the plaintiffs in and under Lansdowne Road, New Road, Portland Road, and Eardley Crescent, which were all highways within that parish maintained and repaired by the defendants as surveyors of the highways within the parish; that the defendants, in repairing the highways, had negligently used steam and other rollers of very great weight in such a manner as to damage the mains and pipes of the plaintiffs under the highways, and the plaintiffs claimed an injunction and damages.

The defendants in their statement of defence denied that the pipes were properly laid, that the rollers used by them had caused the alleged damage, and that there had been any negligence on their part.

The plaintiffs had either laid down themselves or had taken over pipes already laid down in several districts within the parish of Kensington, and in particular in the roads mentioned in the statement of claim.

In the New Road the pipe injured was laid eighteen inches below the surface, in the Portland Road eight inches, and in Eardley Crescent twenty inches; all these pipes were laid down before 1872, at which date the defendants first began to use a fifteen-ton and a ten-ton steam roller for the purpose of repairing the roads. A great deal of evidence was given as to the numbers of fractures in pipes and mains before and since steam rollers came into use, and it appeared that the number of fractures had considerably increased since their use. Evidence was given that in soft places the mains would be safer if laid in concrete, but there was no evidence that it was the general practice to lay mains in a continuous bed of concrete. Evidence was also given to shew that the use of steam rollers enabled the defendants to repair the roads in a shorter time, and thus caused less inconvenience to the public. The private Act of the plaintiffs, 31 & 32 Vict. c. cvi., which incorporated the Gas Works Clauses Act, 1847 (10 Vict. c. 15), provided, by section 8, that the company should be subject to the powers and provisions of the Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125), and by section 62 enacted that "subject to the provisions of the Gas Works Clauses Act, 1847, and of the Acts for the time being in force relating to the local management of the Metropolis, the company from time to time may lay down, make, alter, discontinue, remove, and renew gas mains, pipes, and other apparatus, with all cuts, drains, watercourses, and other requisite incidental works and conveniences, in, through, along, across, or under the streets within the gas limits and the other streets in that behalf specified in this Act; and for that purpose may break up and interfere with streets, railways, bridges, rivers, aqueducts, cuts, canals, and other places within the gas limits and those other streets, and may break up and interfere with any sewers, drains, and pipes in, over, or under the same."

Field, J., at the trial without a jury, gave judgment for the plaintiffs in respect of the damage done in one road, and granted the injunction as prayed.

The defendants appealed.

The Solicitor-General (*Sir F. Herschell, Q.C.*), and *Muir Mackenzie*, for the appellants.—The injunction as granted is too wide, and the facts do not warrant such an injunction; but the contention of the vestry is that no injunction ought to be granted.

The plaintiffs have statutory authority to lay their pipes and mains in the streets; but that right is a right given to them in subordination to the use of a street as a street, and to those necessary repairs of the street which the vestry are entitled, and indeed bound, to execute as speedily and as thoroughly as possible. The evidence establishes that the use of steam rollers enables roads to be repaired with less inconvenience to the public than any other mode of repair.

The defendants derive their powers from the Kensington Improvement Act, 1851 (14 & 15 Vict. c. cxvi.), which incorporates the Towns Improvement Act, 1847 (10 & 11 Vict. c. 34), and from the Metropolis Local Management Act, 1855

(18 & 19 Vict. c. 120). The Kensington Improvement Act makes, by section 25, certain streets highways, and imposes on the commissioners appointed by that Act the duty of paving and repairing them; and by section 26 enacts that certain other streets which are not highways shall be deemed to be public streets, and shall be repaired by the commissioners. Section 27 gives them power to compel the paving of other streets. The sections of the Towns Improvement Act, 1847, which bear on this question are section 48, which makes the commissioners surveyors of highways; section 49, which makes them liable to an indictment for neglecting to repair any public highways; section 51, which empowers them to pave and to raise or lower the level of the streets under their management; section 61, which authorises them to require the persons to whom gas pipes belong to raise or lower them, as the commissioners may direct, at the expense of the commissioners; and section 62, which empowers the commissioners to make such alterations themselves if the persons to whom the pipes belong fail to do so.

The Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), transfers to the vestry, by sections 90 and 96, all the powers of the commissioners, vests the streets in the vestry, and makes them surveyors of highways; by section 105 the vestry are bound to pave and repair new streets; by sections 109 and 110, the surface or soil of a street cannot be broken up without notice to and superintendence of the vestry; and section 247 repeals all private Acts inconsistent with the provisions of this Act. The Metropolis Local Management Amendment Act, 1862 (25 & 26 Vict. c. 102), incorporates by section 73 the provisions of 57 Geo. 3. c. xxix.

Coverdale v. *Charlton* (1), *Rolls* v. *The Vestry of St. George, Southwark* (2), and *The Board of Works for Wandsworth* v. *The United Telephone Company* (3), have settled what is meant by a street vesting in those who have to manage it, and establish that the surveyors of highways have a definite property in the soil below the surface.

Reliance is placed by the plaintiffs on the principle contained in *Rylands* v. *Fletcher* (4); but that case is not in point, for the defendants have not brought on to their land anything which is in its nature dangerous, so that the cases of that class do not apply to the present case; nor is the case of *The Normanton Gas Company* v. *Pope* (5) in point, for that was a case of right of support. Field, J., gave judgment for 5*l.* damages and for the injunction, on the consideration of the facts relating to Eardley Crescent, and those facts raise the question to be decided on this appeal. The Portland Road case was omitted as the pipes were laid so near the surface. The defendants have used both a fifteen- and a ten-ton steam roller, but the Legislature has authorised the use of steam rollers of twelve and fourteen tons, and even of greater weight—24 & 25 Vict. c. 70; 28 & 29 Vict. c. 83; 41 & 42 Vict. c. 77.

Davey, Q.C., *Webster, Q.C.*, *Stirling*, and *Danckwerts*, for the plaintiffs.—The plaintiffs are under a statutory obligation to supply gas; the mains and pipes laid down by them are their property, they are rated in respect of them, and they are entitled to the same protection for them as for any other kind of property. The defendants must shew a statutory authority which empowers them so to repair the roads as to injure the property of the plaintiffs and to commit a nuisance. The pipes are properly laid if they are not laid in such a way as to interfere with the reasonable exercise by the defendants of their statutory powers. The plaintiffs' title rests on their private Act, 31 & 32 Vict. c. cvi., which incorporates 10 & 11 Vict. c. 15. The statutes from which the defendants derive their powers do not deprive the plaintiffs of their absolute right to have their property protected against injury. The plaintiffs have power to

(1) 48 Law J. Rep. Q.B. 128; Law Rep. 4 Q.B. D. 104.

(2) 49 Law J. Rep. Chanc. 691; Law Rep. 14 Ch. D. 785.

(3) 53 Law J. Rep. Q.B. 449; Law Rep. 13 Q.B. D. 904.

(4) 37 Law J. Rep. Exch. 161; Law Rep. 3 E. & I. App. 330.

(5) 52 Law J. Rep. Q.B. 629.

break up the streets, but only under the superintendence of the defendants; they must give notice and they must reinstate them. If the street is not dedicated to the public, then the plaintiffs must get the consent of the owner. The defendants have power under 10 & 11 Vict. c. 34, 18 & 19 Vict. c. 120, and 25 & 26 Vict. c. 102, to alter the levels of streets, and to relay any pipes under the streets.

There is no evidence that it would be reasonable to lay all the mains in concrete, or to use wrought-iron pipes for the mains. The rights of the plaintiffs are not subordinate to those of the defendants. The plaintiffs are bound to lay their pipes so as not to interfere with the ordinary traffic, but they are not bound to alter the position of those pipes so as to protect them from injury caused by the extraordinary use by the defendants of certain rollers.

The principles on which the rights of the plaintiffs are based have been laid down in *Vernon* v. *The Vestry of St. James* (6), *Truman* v. *The London, Brighton, and South Coast Railway Company* (7), *Geddis* v. *The Proprietors of the Bann Reservoir* (8), *The Metropolitan Asylums Board* v. *Hill* (9), *The Normanton Gas Company* v. *Pope* (5), and *Jones* v. *The Festiniog Railway Company* (10).

Cur. adv. vult.

LINDLEY, L.J. (on May 4), delivered the judgment of the Court:—The plaintiffs in this case seek an injunction to restrain the defendants from using steam rollers so as to injure their pipes which are laid down under the surface of the roads and streets in the defendants' district.

Under certain statutes, to which it is not necessary particularly to refer, the roads and streets in question are vested in the defendants, and it is their duty to repair them. No particular method of repairing is prescribed, and, subject to the rights of other people, it may be taken that it is lawful for the defendants to adopt any mode of repairing which they think proper. It appears that since 1872 heavy steam rollers have been used for this purpose; and it is said—and I will assume correctly—that their use is advantageous and beneficial, both to the ratepayers who have to pay the cost of repairs, and to the public who use the streets—beneficial to the ratepayers in point of expense, and beneficial to the public because the metalling of the roads is better and more quickly consolidated by steam rollers than by any other known means. Under certain other statutes to which it is not necessary particularly to refer, the plaintiffs or their predecessors have, both before and since 1872, lawfully laid down gas pipes under the surface of the defendants' roads and streets, and the plaintiffs are entitled to have those pipes there for the purpose of supplying gas to such persons as may desire to be so supplied; and it is material to bear in mind that although the profits not exceeding a certain amount derived by the plaintiffs from the manufacture and supply of gas are divisible amongst the shareholders of the plaintiff company, yet the plaintiffs are bound to supply gas to persons who live in the streets along which their pipes are placed. Speaking generally, the plaintiffs' pipes are laid from twenty to twenty-four inches below the surface of the streets along which they are laid, and this depth is found sufficient to enable them to sustain, without injury, the ordinary traffic, light and heavy, along the streets. The same depth is also sufficient to enable the pipes to remain uninjured by the ordinary modes of repair, if heavy steam rollers are not used. It appears, however, that the steam rollers used by the defendants are so heavy as frequently to injure the pipes of the plaintiffs over which the rollers pass, and this circumstance has given rise to the controversy which we have now to consider.

It is obvious from the foregoing statement that the rights of the plaintiffs and of the defendants are to a certain extent conflicting. On the one hand it is plain that the plaintiffs' rights to lay their pipes

(6) 50 Law J. Rep. Chanc. 81; Law Rep. 16 Ch. D. 449.
(7) 53 Law J. Rep. Chanc. 209; Law Rep. 25 Ch. D. 423.
(8) Law Rep. 3 E. & I. App. 430.
(9) 49 Law J. Rep. Q.B. 668; Law Rep. 6 App. Cas. 193.
(10) 37 Law J. Rep. Q.B. 214; Law Rep. 3 Q.B. 733.

and have them uninjured is subordinate to the right of the public to use the streets and to have them kept in repair; on the other hand it is equally plain that the duty of the defendants to the public and their rights as against the plaintiffs is to repair the streets and keep them fit for traffic. Now there is no dispute that the defendants can perform their duty without using steam rollers of such a weight as to injure the plaintiffs' pipes; but they say it is their duty and right to repair the roads in the most economical and best way, and to avail themselves of all improvements, regardless of the effect on the plaintiffs' pipes. Mr. Justice Field has held that this contention cannot be supported, and we are of opinion that his decision is correct.

The authorities to which he referred, and particularly *The Metropolitan Asylums District Board* v. *Hill* (9), shew that an action lies for an injury, unless such injury is expressly authorised by statute, or is, physically speaking, the necessary consequence of what is so authorised. If in this case the defendants were expressly authorised by statute to use steam rollers of such a weight as necessarily to injure the plaintiffs' pipes, the plaintiffs would have no ground of complaint. The case would be one of *damnum absque injuria*. The same consequence would follow if the defendants were expressly authorised by statute to repair in some way which necessarily required the use of heavy steam rollers, or other machinery which could not be worked without injuring the plaintiffs' pipes; then again, although such rollers or machinery were not expressly mentioned, their use would be authorised by necessary implication, and the plaintiffs would be without redress. But, unless some such statutory enactment can be shewn to authorise the defendants to injure the plaintiffs' pipes, the plaintiffs are entitled to redress. In this case there is no such statute, and it is not necessary to say more. But the conclusion thus arrived at on general principles only is, in our opinion, very much strengthened by those statutory enactments which empower the defendants to require the position of the plaintiffs' pipes to be altered for the public benefit, but which also compel the defendants to pay the expenses of such alterations. Reference may be made particularly to 10 & 11 Vict. c. 34. s. 61; 18 & 19 Vict. c. 120. s. 98; 25 & 26 Vict. c. 102. s. 73, which incorporates section 52 of 57 Geo. 3. c. xxix. (local and personal).

I pass now to consider the question whether the plaintiffs are entitled to an injunction, or only to damages—and if to an injunction, in what form it should be.

The particular instances in which injury to the plaintiffs' pipes by the use of the steam rollers was clearly proved were reduced to one; but I am satisfied by the evidence that there is very considerable danger of frequent injury, and, considering that the defendants claim the right to inflict it—or, in other words, claim the right to use steam rollers of any weight, regardless of the consequences to the plaintiffs—we are of opinion that the plaintiffs are entitled to an injunction.

As regards the form of the injunction, we am also of opinion that it is substantially unobjectionable. But we think it ought to be confined to steam rollers, there being no proof of injury by any other rollers, and no proof of any intention to use any rollers except steam rollers which are likely to do any harm. We also think the words "properly laid" ought to be added, if the defendants wish it, after the words "mains, pipes, or works" of the plaintiffs.

But these variations ought not, in our opinion, to affect the costs of the appeal, which ought to be dismissed, with costs.

Appeal dismissed.

Solicitors—Pontifex, Hewitt & Pitt, for appellants; Bedford & Monier-Williams, for respondents.

[IN THE COURT OF APPEAL.]

1885. May 19. } HASKER v. WOOD.*

Practice — Statutory Costs — Double Costs—8 & 9 Vict. c. 100. s. 105—Order LXV. rule 1.

Order LXV. rule 1 does not apply to costs which are given by statute as a matter of right.

In an action brought for anything done in pursuance of 8 & 9 Vict. c. 100, a successful defendant is entitled to double costs as a matter of right.

Appeal of the plaintiff from the judgment of Mathew, J., and Wills, J., affirming the judgment of Denman, J., refusing to order a review of taxation.

The plaintiff brought an action against the defendant for that the defendant had illegally detained him in Bethlehem Hospital; and the defendant justified under 8 & 9 Vict. c. 100. At the trial before Pollock, B., and a special jury a verdict was found for the defendant.

On the taxation the defendant claimed double costs under 8 & 9 Vict. c. 100. s. 105, whereby if in any action brought against any person for anything done in pursuance of the Act the jury shall find a verdict for the defendant, "the defendant shall recover double costs, and have such remedy for recovering the same as any defendant hath or may have in any other cases by law."

The Master allowed the defendant's claim, and his decision was affirmed by the Divisional Court (Mathew, J., and Wills, J.).

The plaintiff appealed.

The appellant in person.—The principle of allowing double costs was thought to be inequitable, and 5 & 6 Vict. c. 97 (1) was passed repealing the statutes giving such costs. That statute was intended to be prospective. In any case Order LXV. rule 1 is applicable, and a Judge now has absolute discretion as to costs. The items allowed were unreasonable.

Shortt, for the respondent, was not called on.

BRETT, M.R.—If the plaintiff fails in such an action as this, the statute 8 & 9 Vict. c. 100. s. 105 gives double costs to the defendant as a matter of right, and costs so given are not dealt with by Order LXV. rule 1. Therefore that Order does not give the Court power to alter the statute in question, which has not been repealed. It seems to me that, as said by Lord Blackburn in *Garnett* v. *Bradley* (2), it was not intended by the Order to overrule costs which are given by statute to a particular individual as a matter of right. This appeal must therefore be dismissed.

BAGGALLAY, L.J., and BOWEN, L.J., concurred.

Appeal dismissed.

Solicitors—Still & Son, for respondent.

1885. March 3, 4. } SNOW (*appellant*) v. HILL (*respondent*).

Gaming—Betting Houses Act (16 & 17 *Vict. c.* 119)—*Place used for the purpose of Betting—Persons resorting thereto.*

[For the report of the above case, see 54 Law J. Rep. M.C. 95.

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* *Coram* Brett, M.R., Baggallay, L.J., and Bowen, L.J.

(1) 5 & 6 Vict. c. 97. s. 2: "And be it enacted that so much of any clause, enactment, or provision in any public Act or Acts . . . . whereby it is enacted or provided that either double or treble costs, or any other than the usual costs between party and party, shall or may be recovered, shall be, and the same are hereby repealed: Provided always, that instead of such costs the party or parties heretofore entitled under such last-mentioned Acts to such double, treble, or other costs, shall receive such full and reasonable indemnity as to all costs, charges, and expenses incurred in or about any action, suit, or other legal proceeding, as shall be taxed by the proper officer in that behalf, subject to be reviewed in like manner by the same authority as any other taxation of costs by such officer."

(2) 48 Law J. Rep. Exch. 186; Law Rep. 3 App. Cas. 944.

BANKRUPTCY. 1885. May 11. } *In re* RYLEY; *ex parte* THE OFFICIAL RECEIVER.

Bankruptcy—Receiving Order—Arrest for Non-payment of Instalment under Judgment Summons — Payment under Protest of Moneys of Official Receiver— County Court Rules, January, 1884— *Bankruptcy Act,* 1883 (46 & 47 *Vict. c.* 52), *s.* 9.

On the making of a receiving order, the right of a judgment creditor to arrest the debtor under a warrant of commitment made before the date of the receiving order is lost.

On the 12th of January, 1885, an order of committal was made in the Mayor's Court, London, against the debtor, who was the Registrar of the Whitechapel County Court, for non-payment of an instalment of 2*l.* 8*s.* 6*d.* due under a judgment summons taken out under a judgment recovered in the Mayor's Court by A. Jones & Co. against the debtor.

On the 12th of February, 1885, a receiving order was made against the debtor.

On the 23rd of February, 1885, the estate of the debtor was ordered to be administered in a summary manner under section 121 of the Bankruptcy Act, 1883; but no order of adjudication was made against the debtor.

On the 20th of February the debtor applied to the assistant receiver, to whom the matter was assigned, to make an allowance to the debtor out of his property for the support of himself and his family. The assistant receiver, before acceding to the application, required the debtor to pay to the official receiver so much of his salary as Registrar of the Whitechapel County Court as was then due.

On the 25th of February, 1885, while the debtor was proceeding to the office of the official receiver for the purpose of paying over the amount of the salary then due, the sergeant-at-mace of the Mayor's Court served upon the debtor the warrant of commitment for his arrest issued by the Mayor's Court, and the debtor thereupon, to avoid arrest and commitment to prison, paid to the sergeant-at-mace, under protest, the sum of 2*l.* 8*s.* 6*d.*

The official receiver now moved that the sum of 2*l.* 8*s.* 6*d.* in the hands of the sergeant-at-mace be directed to be paid over to the official receiver.

Muir Mackenzie, for the official receiver, submitted that, after a receiving order had been made, section 9 of the Bankruptcy Act, 1883, applied, and that the procedure for committal of the debtor being in effect in the nature of an execution for a debt, payment of which the creditor had no right to enforce subsequently to the receiving order, the money paid to the sergeant-at-mace belonged to the creditors, and therefore the official receiver was entitled to it. He cited *Cobham* v. *Dalton* (1) and *Lees* v. *Newton* (2).

[CAVE, J., referred to the County Court Rules, January, 1884 (3).]

Mr. Tucker, solicitor, *contra*, submitted that the order of committal, being made before the receiving order, was in truth a process for contempt, and not an execution for payment of a debt.

CAVE, J.—I am of opinion that section 9 of the Bankruptcy Act, 1883, and the case of *Cobham* v. *Dalton* (1) apply to this case, and that, on the receiving order being made, the judgment creditor lost the right of enforcing payment by arrest. That this is the true construction of the Act appears also from the County Court Rules, January, 1884 (3). The first of these rules does not apply here because the order of commitment was made before the receiving order; but the rule shews that the process of commitment is not a means of punishing contempt, but a means of enforcing payment, and therefore there is a very good reason why, when a receiving order has been made, the process should determine. The 2nd rule carries the case further. That rule provides as follows: [His Lordship read

(1) 44 Law J. Rep. Chanc. 702; Law Rep. 10 Chanc. 655.

(2) 35 Law J. Rep. C.P. 285; Law Rep. 1 C.P. 658.

(3) These rules will be found set forth in 53 Law J. Rep. Orders and Rules, at p. 163.

the rule.] The result of the debtor filing an affidavit that a receiving order has been made is that he is discharged out of custody, shewing clearly that the commitment order is suspended. I think, therefore, that the official receiver is entitled to the order he asks for.

Order as prayed. Judgment creditor to pay costs.

Solicitors—W. W. Aldridge, for official receiver; J. Tucker, for A. Jones & Co.

[IN THE COURT OF APPEAL.]

1885. May 21, 22. BOWKER *v.* EVANS.*

Action—Abatement—Tort—Reference to Arbitration purporting to bind Representatives—Actio Personalis.

Where an action of tort dying with the person is referred to arbitration by an order made by consent, and with a stipulation that the award shall bind the representatives in the case of the death of either party, and the plaintiff dies before the award, the action abates, and the plaintiff's executors cannot be substituted.

Appeal of the defendant from the order of Manisty, J., and Lopes, J. (Grove, J., dissenting), refusing to strike out the case stated in the action; and appeal of the executors of the plaintiff against an order of the same Judges setting aside an order of Field, J., substituting them for the deceased plaintiff.

The action was brought by the owner of the surface to recover damages from the owner of the subsoil for subsidence. By consent and by an order at chambers the action was referred to an arbitrator, the respective representatives of the parties to be bound by the award in case of the death of either of them. The plaintiff died after the hearing but before the arbitrator made his award. The arbitrator stated a case for the opinion of the Court.

* *Coram* Brett, M.R., and Bowen, L.J.

Ambrose, Q.C., and *Sutton*, for the executors of the plaintiff.—But for the clause in the order of reference the cause of action would be gone. A meaning must be given to this clause, otherwise it was useless putting it in. If the reference had been by order at Nisi Prius a verdict would have been entered subject to the arbitrator's award, and the action would not have abated. This clause was inserted in order to bring about the same result. They cited *Tyler* v. *Jones* (1), *Lewin* v. *Holbrook* (2), *Toussaint* v. *Hartopp* (3), *Clarke* v. *Crofts* (4), *Lewis* v. *Winter* (5), *MacDougall* v. *Robertson* (6), *Maffey* v. *Godwyn* (7), and *Conolan* v. *Leyland* (8).

The Solicitor-General (*Sir F. Herschell, Q.C.*), and *Heywood*, for the defendants, were not called on.

BRETT, M.R.—In this case it was alleged by the plaintiff that the defendant had done something which by law gave the plaintiff a title to a remedy, and this the defendant denied. The plaintiff alleged that the defendant had done acts which amounted to a *tort*. What is the cause of action in a *tort*? The plaintiff has a remedy if he can obtain it during his lifetime. If the remedy is not obtained before he dies, the cause of action—that is, the right to any remedy—dies with him. The cause of action can be tried in different ways. It can be tried by a Judge, a jury, or an arbitrator. When two persons agree that it shall be tried by an arbitrator, what is their agreement? It is that, instead of the Court deciding the dispute, the arbitrator shall decide it. What, again, is the "dispute"? It is the cause of action, and the agreement is as to the mode of procedure. There is no agreement that the cause of action existed, be-

(1) 3 B. & C. 144.
(2) 11 Mee. & W. 110; 12 Law J. Rep. Exch 267.
(3) 7 Taunt. 571.
(4) 4 Bing. 143.
(5) W. W. & D. 47.
(6) 4 Bing. 435.
(7) 1 Nev. & M. 101.
(8) 54 Law J. Rep. Chanc. 123; Law Rep. 27 Ch. D. 632.

cause that is the very thing to be tried. The cause of action and the right to compensation remain exactly what they were before the agreement. In other words, the agreement does not alter the right, but only the procedure. Two questions arise as to the mode of procedure. If the dispute is gone, the agreement as to the mode of procedure is gone. If, therefore, the cause of action disappears with the death of the plaintiff, the cause of action is gone altogether. The stipulation inserted in regard to the death of the parties becomes futile. It must be struck out as inapplicable to an action of *tort*. Its insertion no doubt arose from its being taken from a form applicable to a case in which the cause of action survives.

BOWEN, L.J., concurred.

Solicitors—Burton, agent for Bowden & Walker, Manchester, for plaintiff; Chester & Co., agents for Crofton & Craven, Manchester, for defendant.

1885. Feb. 24, 26. } SPACKMAN *v.* THE PLUMSTEAD DISTRICT BOARD OF WORKS.

Metropolis — Building beyond Line of Street—Metropolis Management Amendment Act, 1862 (25 & 26 *Vict. c.* 102), *s.* 75—"*General Line of Buildings*"—"*To be decided by the Superintending Architect*"—*Jurisdiction of Magistrate—Architect's Decision.*

[For the report of the above case, see 54 Law J. Rep. M.C. 81.]

1884. Oct. 24. } *Ex parte* HASKER.

Practice—Fee on entering Rule Nisi—Order as to Supreme Court Fees, 1884, *Schedule* 52.

[For the report of the above case, see 54 Law J. Rep. M.C. 94.]

BANKRUPTCY. 1885. Nov. 24. Dec. 15. } *In re* J. G. AND F. HEPBURN; *ex parte* SMITH.

Bankruptcy—Partnership — Retirement of Partner—Bankruptcy of Continuing Partners—Proof by Executors of Retired Partner in Competition with Creditors of Old Firm—Claims of Creditors barred by Statute of Limitations as against Estate of Retired Partner—Trust for Payment of Debts out of Real Estate—No Real Estate — Real Property Limitation Act, 1874 (37 & 38 *Vict. c.* 57), *s.* 10.

A retired member of a partnership is not precluded from proving in bankruptcy against the estate of the continuing partners in competition with creditors of the original firm, where the claims of such creditors as against the retired partner are barred by the Statute of Limitations.

A trust in a will for the payment of debts out of real estate does not prevent the operation of the Statute of Limitations, if the testator in fact leaves no real estate to support the trust.

Appeal by the executors of John Hepburn against the rejection by the trustee in liquidation of J. G. and F. Hepburn of their proof against the separate estates of the liquidating debtors.

The facts and arguments appear sufficiently from the judgment.

J. A. Creed and *Dunham*, for the executors of John Hepburn.

Northmore Lawrence and *S. Woolf*, for the trustee.

Finlay Knight, for creditors of J. and T. Hepburn & Son.

The following cases and authorities were referred to in argument: *Ex parte Gordon; re Dixon* (1), *Nanson* v. *Gordon* (2), *Ex parte Atkins* (3), *Ex parte Grasebrook* (4), *Ex parte Thompson* (5), *Ex parte Carter* (6), *Ex parte Andrews;*

(1) 44 Law J. Rep. Bankr. 17; Law Rep. 10 Chanc. 160.
(2) 45 Law J. Rep. Bankr. 89; Law Rep. 1 App. Cas. 195.
(3) Buck, 479.
(4) 2 Deac. & C. 186.
(5) 3 Deac. & C. 612.
(6) 2 Glyn &. J. 233.

in re Wilcoxon (7), *Scott* v. *Jones* (8), *Hughes* v. *Wynne* (9), *Courtenay* v. *Williams* (10), *Stahlschmidt* v. *Lett* (11), *Lindley on Partnership*, 4th ed. vol. 2, pp. 1190, 1191, *Lewin on Trusts*, 7th ed. pp. 471, 472, *Shelford's Real Property Statutes*, 8th ed. p. 290, and section 10 of the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57) (12).

CAVE, J.—This is an appeal by the executors of John Hepburn against the rejection by the trustee of their proof against the separate estate of each of the bankrupts.

Previous to 1875, the testator John Hepburn, Thomas Hepburn, and the two bankrupts, carried on business under the name of J. and T. Hepburn & Son. On the 24th of February, 1875, an agreement was made between the partners, in pursuance of which John, the testator, retired from the firm in consideration of a sum of money to be paid by the continuing partners as the purchase-money of his share. After his retirement John Hepburn, at the request of the continuing firm, paid creditors of the old firm 16,690*l.* in discharge of the liabilities of the old firm, against which the continuing members were bound to indemnify him. In 1876 John Hepburn died, and after his death his executors lent the then firm 7,600*l.* (13).

In 1880 Thomas Hepburn died, and in 1883 the surviving partners filed a petition for liquidation.

In October, 1883, the executors of John Hepburn sent in a proof against the separate estates of the bankrupts for 59,988*l.*, composed partly of the unpaid purchase-money of John's share in the old firm, partly of money paid by him after his retirement to creditors of the old firm at request of the continuing firm, and partly of money lent by the executors of John Hepburn to the continuing firm after his death. As to so much of the proof as related to money lent by John Hepburn's executors to the continuing partners after his death, it was admitted that to that extent the rejection of the proof could not be supported.

As to the residue of the proof, it was contended that the executors were not entitled to prove because there were creditors proving against the joint estate of the bankrupts in respect of debts due from the old firm of which John Hepburn was a member, and which had never been discharged. It was argued that the executors might prove, because John Hepburn's estate was no longer under any liability to the creditors of the old firm, as their debts were barred as against John Hepburn's estate by the Statute of Limitations.

To this it was answered, first, that the debts were not barred by the statute, because John Hepburn's will contained a trust for the payment of debts; and secondly, that even if they were barred, that only affected the remedy by action, and did not prevent the application of the rule forbidding a partner's executors to prove against the estate of the surviving partner in competition with the joint creditors.

As to the first point, John Hepburn's will does, in fact, contain a trust for the payment of his debts out of his real estate. But John Hepburn left no real estate whatever, and it seems to me that this case falls within the principle of *Scott* v. *Jones* (8). In that case Mr. Donovan, by his will, charged his debts upon his real estate at Tibberton. It turned out, however, that his estate there, which he supposed to be freehold, was leasehold only, and it was held that the operation of the statute was not pre-

(7) 53 Law J. Rep. Chanc. 411; Law Rep. 25 Ch. D. 505.

(8) 4 Cl. & F. 382.

(9) Turn. & R. 307.

(10) 3 Hare, 539; 13 Law J. Rep. Chanc. 461.

(11) 1 Sm. & G. 415.

(12) It was also argued on behalf of John Hepburn's executors, that, excluding their debt, there was no surplus of the estate of the debtors available for payment of the creditors of the estate of J. and T. Hepburn & Sons, and, therefore, the rule which precludes a partner from proving in competition with his own creditors did not apply; but it is unnecessary to report the argument or cases cited upon this part of the case.

(13) John Hepburn, after his retirement from the partnership, lent to the continuing partners 4,200*l.*, and in February, 1878, the executors of John Hepburn lent a further sum of 3,400*l.*, making together the above sum of 7,600*l.*, said to have been lent by the executors.

vented by the charge in the will, even as to that part of the personal estate which he had erroneously supposed to be realty. Now, if the charge does not affect that part of the personal estate which is erroneously supposed to be realty, how can it affect that part which is not supposed to be realty—or, in other words, how can it have any effect upon the personalty at all? I am of opinion that a charge upon the real estate where there is no real estate has no operation whatever; and that, apart from the Real Property Limitation Act of 1874, section 10, the joint creditors of the old firm are barred by the statute so far as John Hepburn's estate is concerned.

The remaining point, as to the effect of the Statute of Limitations, is, so far as I am aware, a new one. It is contended that although the joint creditors are barred so far as any right of action against the executors of John Hepburn is concerned, yet the executors are still within the operation of the rule which forbids a co-partner, or the personal representative of a deceased partner, from proving in competition with his own creditors. It is said that the statute bars the remedy but not the right, and consequently that the executors still remain indebted to the joint creditors, although the latter cannot enforce their right by action. This, although not an uncommon, is, in my judgment, an incorrect way of stating the effect of the Statute of Limitations. There is in law no right without a remedy, and if all remedies for enforcing a right are gone, the right has, in point of law, ceased to exist. In the case of a debt, the ordinary and universal remedy is by action against the debtor. There may, however, and sometimes does, exist another remedy, not by action against the debtor, but arising out of the possession of property of the debtor, which by law or contract may be detained by the creditor until the debt is paid. This latter remedy may exist although the remedy by action is barred, and in that case the debt continues to exist so far as is necessary for the enforcement of this right of lien, but not for enforcing the remedy by action. When the debt is barred by the statute, and the creditor has no lien, the debt is gone for all purposes. This limited right is recognised in bankruptcy and where a creditor has a lien he may make use of it to enforce payment of his debt, although it is statute-barred and the debtor has become bankrupt. But for the purposes of proving, the remedy by action can alone be looked at; and if that is barred there is no longer any right to prove, because there is no longer any right to the debt capable of being enforced by action. In this case, if the joint creditors had any lien on the estate of John Hepburn, they might enforce it, notwithstanding their debt is statute-barred. But they are seeking to do more than this, they are invoking the assistance of the Court, and are seeking to make use of their debt as if it still conferred upon them a right of action against the executors so as to make them creditors of the executors in some other and further way than that of merely giving them a right to use any lien they may have on the estate of John Hepburn so as to compel payment of the debt. If they had any such lien, the order I am about to make would not deprive them of it. I am of opinion that they are not creditors of the executors in any such sense as entitles them to say that the executors in proving against the separate estate of the debtors are infringing the rule against proving in competition with one's own creditors.

This view renders it unnecessary that I should consider the other question raised on behalf of the appellants (12).

The executors must be admitted to prove for the whole of their debt, and they must have their costs of this appeal out of the estate. The trustee may also take his costs out of the estate.

Order accordingly.

Solicitors— H. White, for executors of John Hepburn; Hollams, Son & Coward, for trustee; Hepburn, Son & Cutcliffe, for creditors of J. & T. Hepburn & Sons.

[IN THE COURT OF APPEAL.]

BANKRUPTCY. 1885. June 19. } *In re* MILNER; *ex parte* MILNER.*

Composition Deed—Preference to one Creditor—Effect of on Deed.

A deed of arrangement for the payment of a composition made between a debtor and his creditors must, whether it is or is not made under the provisions of a statute, be based and carried out on the principle of perfect equality. The law implies, in the absence of any express provision to the contrary, a term or condition in such a deed that the debtor agrees with the creditors, and the creditors agree with him and with each other, that all who are parties to the deed shall come in and be placed on exactly the same footing: so that the acceptance by one creditor of a bonus or gratuity beyond that secured to all by the deed will, if that bonus is paid with the knowledge of the debtor, though not by him or out of his estate, entitle any other creditor who is a party to the deed to avoid it, and to proceed as though the deed were cancelled.

Dauglish *v.* Tennent (36 Law J. Rep. Q.B. 10) *approved.*

Appeal by Milner from the refusal of the Registrar to set aside a bankruptcy notice served on him.

Milner being indebted to a number of persons, and no proceedings having been taken in bankruptcy, an arrangement was entered into between him and certain of his creditors, of whom Townend was one, that a deed of arrangement should be prepared containing provisions that the debtor should carry on his business, that he should pay any creditors who signed the deed of arrangement a sum of 10*s.* in the pound within six years, that those who signed the deed and entered into the arrangement should thereby release the debtor from all claim; and the deed contained, amongst other terms, a provision that the debtor should not be liable to be sued, or have execution issued, or judgment entered against him, by any of the creditors who signed it, if he carried out the provisions of the deed. Townend, a creditor who had obtained a judgment against the debtor, signed this deed. After he had signed three other creditors of Milner also signed it; but as it appeared that they had received from the brother of the debtor money in payment of the debts due to them over and above the 10*s.* fixed by the deed of arrangement, Townend considered that this was a fraudulent preference, and that he was at liberty to avoid the deed; and he accordingly served on Milner a bankruptcy notice under 46 & 47 Vict. c. 52. s. 4. sub-s. 1 (*g*). Milner applied to the Registrar to set aside this notice, but the application was refused, and from this refusal the debtor appealed.

E. C. Willis, Q.C., and *F. Willis*, for the appellant.—This deed was not made under any statute, so that the principles which apply to statutory composition deeds do not apply to this deed. It is a deed limited to the creditors signing it, and it is not void or voidable because after one creditor signed it others signed who had received some money, not from the debtor's estate, but from a stranger—*Carey* v. *Barrett* (1). The bankruptcy notice ought to be set aside, because the creditor who issued it is a party to the deed, which provides that no proceedings are to be taken against the debtor.

Herbert Reed, for the respondent.—The refusal of the Registrar was right; there has been a fraudulent preference. The principle to be applied to these deeds is that all the creditors come in on equal terms, whereas the three creditors who had already been paid something and then became parties to the deed had an advantage over the creditor who has served this bankruptcy notice. The principle to be applied is the same, whether the deed of arrangement is made under a Bankruptcy Act or not. *Knight* v. *Hunt* (2), *Malalieu* v. *Hodgson* (3), *Dauglish* v. *Tennent* (4), and *Ex parte Barrow* (5) were referred to.

* *Coram* Brett, M.R., Baggallay, L.J., and Bowen, L.J.

(1) Law Rep. 4 C.P. D. 379.
(2) 5 Bing. 432.
(3) 16 Q.B. Rep. 689; 20 Law J. Rep. Q.B. 339.
(4) 36 Law J. Rep. Q.B. 10; Law Rep. 2 Q.B. 49.
(5) 50 Law J. Rep. Chanc. 821; Law Rep. 18 Ch. D 464.

In re Milner; ex parte Milner (App.), Bankr.

[BRETT, M.R.—In all these deeds, whether made in or after a bankruptcy or not, is there not a condition implied by law that all the creditors sign on equal terms; and if they do not, may not the deed be avoided? BOWEN, L.J.—Are not the parties led to understand that the machinery of the deed is used to create perfect equality?]

E. C. Willis, Q.C., in reply.—*Dauglish* v. *Tennent* (4) is a decision on a deed made under an Act of the colony where it was made, so that the judgment of the Court only applies to deeds of arrangement made under a statute; and there is no reason why the principles which have been applied to statutory compensation deeds should be extended to such a deed as this.

BRETT, M.R.—In this case the debtor Milner was indebted to a number of persons. No petition in bankruptcy was presented, and, irrespective of any petition, an arrangement was made between him and certain of his creditors that any of them who signed a deed of arrangement, which it was proposed to make, should receive a dividend of 10*s.* in the pound upon the amount of their debts, and that, if that sum was paid within a certain time, they would release the debtor from all claims against him. This arrangement was carried out by a deed, which contained the terms which had been agreed upon. This deed was to be signed by any creditor who chose, and it only bound those creditors who did sign it. I think that the evidence before the Registrar justified him in finding that the debtor met certain of his creditors, that he entered into this arrangement with them, that other creditors came in afterwards and signed the deed, that the creditor Townend who served this bankruptcy notice entered into the arrangement and signed the deed in good faith; that no fraudulent representation was made to him before he signed it; that after he signed it, one or two or three creditors signed the deed also, but that they did so only because the debtor's brother paid to them certain parts of their debts in order to induce them to sign the deed, and that that was the reason why they signed it. Townend, who had previously signed the deed, afterwards became aware of this, and alleges that, as these other creditors received these payments, and signed the deed upon the terms of their receiving them, the whole deed has become void, and that his signature can be and ought to be cancelled, because, as he alleges, the debtor was aware of these facts. I am of opinion that the debtor did know that his brother had made or would make the payments; and the question is, whether these facts entitle the creditor Townend to avoid this composition deed, it being a composition deed not made under the provisions of any statute, but being what may be termed a deed of arrangement at common law.

The first question is whether this result would follow if the debtor had himself made such payments as these upon such terms as these, and then whether it makes any difference if the payments are made by the brother of the debtor with the knowledge of the debtor. I am prepared to hold that it is of the essence of a composition-deed that all the creditors who come in to a composition-deed bind themselves by way of obligation both to each other and to the debtor, and that he binds himself in the same way to all and each of the creditors that as far as the debtor is concerned all the creditors come in upon equal terms. This, I think, is implied by law in the transaction, and if a deed is made, then I think that, unless the deed clearly contradicts that implication, it becomes an implied condition of the deed, so that if it is broken the deed becomes voidable as far as concerns every creditor who signs it; and I think that this is a general principle which applies to all composition deeds, whether they are or are not made pursuant to the provisions and authority of a statute. I think that the case of *Dauglish* v. *Tennent* (4) states the principle. In that case the deed was made pursuant to the provisions of a statute, but the decision was, I think, based upon the broader ground to which I have adverted; for, as Mr. Justice Mellor said, "This is a deed of arrangement voluntarily made between the debtor and certain creditors, the effect of which is said to be to release the debtor from his debts. To put the case on a broad ground, it is an agreement between the debtor and each creditor that they are contracting on

terms of equality as to each and all; and if by a secret bargain some creditors have an advantage over other creditors, it is a fraud upon those who must be presumed to have signed the deed upon the understanding that all the creditors should be placed on the same footing." I would add that I think such an agreement is not only an agreement between the debtor and each creditor, but that it is also an agreement between each creditor and every other creditor, that they are all contracting on terms of equality as to each and all. Mr. Justice Lush, in the same case, says, "It must be taken that every creditor who signed the deed stipulated for good faith between the debtor and the whole of the creditors"—(I would add, also for good faith amongst themselves)—"and that the release was only to take effect if and when the requisite majority of the creditors should have *bona fide* executed the deed; and if the execution of some was obtained by bribery, then it is not such an execution of the deed as was contemplated." This case shews that one reason for the principle is, that other creditors would not enter into the arrangement unless they understood that all who enter into it will be placed on a footing of absolute equality. Lord Kenyon said in *Cockshott* v. *Bennett* (6), "The contract in the present case affected all the other creditors by rendering abortive all that they had intended to do for the bankrupt in compounding for their debts."

That case supplies another ground why this implication should be made, and the result is that there is an implied condition that the deceived creditor can in such circumstances avoid the deed of arrangement, whether that which entitles him to do so is done after or before he himself signs the deed. The case of *Knight* v. *Hunt* (2) goes still further, and shews that it matters not whether the preference is or is not carried out at the expense of the debtor himself. If it were carried out at the expense of a third person, the debtor being altogether unaware of it, I should hesitate before saying that it rendered the arrangement voidable; but I am of opinion that if he were aware of it, it would do so. The principle which it has already been decided applies to composition-deeds made under the authority of a statute applies also to composition-deeds not so made; so that in this case the deed was voidable at the option of the creditor. He has elected to avoid it; and, this being so, he was entitled to take the proceedings which he did; so that the decision of the Registrar was right, and this appeal must be dismissed.

BAGGALLAY, L.J.—If the deed of arrangement which has been entered into in this case is, in the circumstances of this case, a valid deed, it does, from the terms contained in it, afford a conclusive answer to any action brought or judgment enforced by any creditor who is a party to it. The Bankruptcy Act of 1849 (12 & 13 Vict. c. 106) contained three modes by which compositions might be effected, the third being that found in section 230, which enabled a composition to be offered and accepted after an adjudication of bankruptcy; and with regard to this, section 231 provided that "if any creditor shall agree to accept any gratuity or higher composition for assenting to such offer, he shall forfeit the debt due to him, together with such gratuity or composition." More than one decision was given upon these provisions in the matter of the bankruptcy of C. J. Mare & Co., and the judgments in *Mare* v. *Sandford* (7) and *Mare* v. *Warner* (8) deal with the subject; and it is to be observed that in the former case the Vice-Chancellor said, "The 231st section of the Bankruptcy Act . . . positively enacts with reference to this principle 'that if any creditor shall agree to accept any gratuity or higher composition for assenting to such offer, he shall forfeit the debt due to him, together with the gratuity and composition.' That section does not enact the law which makes the contract illegal, because the law is well established already, but it imposes a penalty on the creditor who shall have consented to accept on a private bargain a gratuity or secret advantage of that particular kind."

A bonus, therefore, accepted by a credi-

(6) 2 Term Rep. 763.

(7) 1 Giff. 288.
(8) 3 Giff. 100.

tor invalidates the transaction. In this case the question arises on a bankruptcy notice, but the principle is a general one, and the question here must be decided on the general principles of the law. Those principles are well explained in *Dauglish* v. *Tennent* (4), to which the Master of the Rolls has referred. I agree also with the conclusion of fact to which the Master of the Rolls has come, and I see no distinction between the principle which had to be applied in *Dauglish* v. *Tennent* (4) and the principle which must be applied here; so that, as I am satisfied that under this deed certain creditors have received an additional advantage which certain other creditors have not received, and that the debtor knew this, I think the objection to the decision of the Registrar fails.

BOWEN, L.J.—This question must be decided according to the established principles of the common law. A simple composition arrangement means an arrangement by which each creditor who comes in to it gives up part of what is due to him, the consideration for his doing so being that other creditors come in and do likewise. It follows that the essence of the transaction is that all who take part in it act on the faith that they all come in upon equal terms. The deed is drawn up to carry out this arrangement on the principle of equal division, and each creditor believes that no private bargain exists which will render abortive this principle of equality. If then there is any agreement which destroys this principle of equality, such an agreement is a breach of faith; and if the debtor is aware of its existence, he is then guilty of fraudulent concealment, which strikes at the root of the deed of arrangement, and entitles any creditor who has been so deceived to avoid the deed.

Appeal dismissed.

Solicitors—Bird & Moore, for appellant; Ross & Co., for respondent.

[IN THE COURT OF APPEAL.]

1885. June 23. NEWLANDS *v.* THE NATIONAL EMPLOYERS' ACCIDENT ASSOCIATION (LIMITED) (*in liquidation*).*

Company—Contract to take Shares—Contract induced by Fraud of Secretary of Company—Liability of Directors of Company for—Authority of Secretary to make Representations—Principal and Agent.

The secretary of a company has no general authority to make representations to induce persons to take shares in a company: so that a person who is induced to take shares in a company by a fraudulent misrepresentation, not authorised by or known to the officers of the company entitled to make representations, of the secretary of a company is not entitled to maintain an action against the company for the rescission of the contract, or for damages for such misrepresentation.

Appeal from the judgment of Lopes, J., at the trial without a jury.

The plaintiff brought an action seeking to rescind a contract by which he had taken shares in the defendant company, to recover calls which he had paid, and for damages. The defendant company counterclaimed for unpaid calls. The company having gone into liquidation, the liquidator was also joined as a defendant.

The ground on which the plaintiff sought to rescind the contract was that he had been informed by Allen, the secretary of the company, that if he took 500 shares in the company he would be appointed solicitor to the company. The plaintiff accordingly sent in an application for shares on a regular printed form addressed to the directors of the defendant company. The directors allotted the shares to the plaintiff, he accepted them, and he paid certain calls which became due on them. Allen, the secretary, also told him through a man named Bell that he had been appointed solicitor of the company.

It was admitted that these statements made by Allen were false, that they were false to his knowledge, that the directors of the company had not authorised the

* *Coram* Brett, M.R., Baggallay, L.J., and Bowen, L.J.

secretary to make them, that they were unaware that he had made them, and that it was these statements which induced the plaintiff to take the shares. The plaintiff brought this action two years after the shares had been allotted to him.

Lopes, J., gave judgment for the defendant company.

The plaintiff appealed.

Waddy, Q.C., Reid, Q.C., and *J. Walton*, for the plaintiff.—The plaintiff is entitled to have the contract to take shares rescinded, even though he has been a registered shareholder for two years. He was induced to take the shares by a fraudulent misrepresentation made by an agent of the directors of this company—*The Western Bank of Scotland* v. *Addie* (1).

[BOWEN, L.J.—Was the secretary an agent authorised to make such representations, within the rule laid down in that case?]

Yes. A secretary is a person authorised to make communications about the company to persons desiring to enter into relations with the company.

[BRETT, M.R., referred to *Partridge* v. *The Albert Life Assurance Company* (2).]

In that case the transaction was different: there, a mere stranger desiring to deal in the open market applied to a secretary, who gave certain information; but here, a person desiring to treat with the company applied to a person held out by the directors as secretary and as the person to whom persons should apply. The plaintiff seeks to resist the enforcement of a contract obtained by fraud. The contract was really void *ab initio*. Further, the contract to take shares was only conditional; the condition has not been complied with, so that the contract is void. The secretary was a person authorised to receive conditional applications, and authorised to transmit them to the directors, so that they are responsible for his fraudulent misrepresentation. *Pellatt's Case* (3), *Burwick* v. *The English Joint Stock Bank* (4), *Holdsworth* v. *The City of Glasgow Bank* (5), and *Shaw's Case* (6) were referred to.

Forbes, Q.C., and *Firth*, for the defendant company.—The prospectus informed the plaintiff that the directors allotted shares. His application was made to the directors, the directors did allot, he accepted that allotment, he paid calls, and two years have elapsed since he was registered. A secretary is not by law or business usage a person authorised to make representations to an applicant for shares. The remedy of the plaintiff is against the secretary individually; the directors and the company are not liable for his fraud.

Reid, Q.C., in reply.

BRETT, M.R.—The plaintiff has brought an action against a limited company. The only part of the action with which the Court has now to deal is that part which raises the question whether he is able to maintain the action in so far as it requests that he may be relieved from consequences which follow on his having been registered as a shareholder in the defendant company. He was so registered in consequence of his having applied for shares on a regular form requesting the directors of the company to allot shares to him. The shares were allotted to him by the directors in the regular way, he received a letter of allotment, and he has paid certain calls which were made on him as a shareholder; but he now asks to have the register rectified and to have his name struck off. There was originally a claim for damages, but it is now admitted that that claim cannot be maintained. In answer to this action the defendant company not only alleges that the plaintiff has not the right to the relief which he seeks, but it also claims by way of counter-claim certain calls which have been made but not paid. The ground on which the plaintiff seeks to rescind the contract by which he took shares is that he alleges he was induced to take the shares by a fraudulent misrepresentation made by one Allen, the secretary of the defendant company. This secretary did, through an innocent agent, fraudulently misrepresent to the plaintiff that if

(1) Law Rep. 1 H.L. Sc. App. 145.
(2) 16 Sol. Journal, 199.
(3) 36 Law J. Rep. Chanc. 613; Law Rep. 2 Chanc. 527.
(4) 36 Law J. Rep. Exch. 147; Law Rep. 2 Exch. 259.
(5) Law Rep. 5 App. Cas. 317.
(6) 34 Law Times, 715.

he took 500 shares he would receive the appointment of solicitor to the company, and he afterwards told the plaintiff that he had in fact been appointed to be the solicitor of the company; and it is these statements, which were false to the knowledge of Allen, the secretary, who made them, which induced the plaintiff to take shares in the company. It is indeed admitted that this is the case; but the defendant company alleges in answer that the plaintiff entered into the contract to take the shares by sending in to the directors of the company a formal application for shares on a printed form addressed to the directors of the company and to no one else. The directors did not know that any representation at all had been made by the secretary, much less that any fraudulent misrepresentation had been made by him; they had not given to the secretary any authority to make any representations; and they contend that the contract which was made by the plaintiff was made with them, and that the misrepresentation made by the secretary can have no effect upon that contract, for that the secretary not being a person authorised to make any representations, what he said to the plaintiff can have no effect upon the contract, and is of—as far as the relations between the plaintiff and the company are concerned—no more force than if a representation had been made by a stranger. It seems to me to be clear that if the misrepresentation made by the secretary was made by him as a person with no greater power or authority than if he had been a complete stranger, then it must follow that although the plaintiff was in fact induced by that fraudulent misrepresentation to enter into the contract, still he cannot avoid the contract so entered into with the company—he can only in such a case sue the person through whose fraud he has been misled, and recover from him the damages he claims.

There is no evidence in this case that the secretary of this company had authority to make such a representation as was here made for such a purpose as this; and, this being so, the plaintiff relies on the general knowledge of general business which is to be attributed to the Court.

Then it is for the plaintiff to make out that there is such a practice or regular course of business; and he has not done so in this case—and this for the best reason, that he could not do so; and as from the knowledge which the Court has of regular business it cannot say that a secretary has, as a general practice, authority to induce people to take shares, it follows that it cannot hold that this secretary had any such authority. A secretary is a mere servant; his position is that he is to do what he is told, and no person can assume that he has any authority to represent anything at all; nor can any one assume that statements made by him are necessarily to be accepted as trustworthy without further enquiry, any more than in the case of a merchant it can be assumed that one who is only a clerk has authority to make representations to induce persons to enter into contracts. In all such cases it is clearly the duty of persons who wish to be accurately informed on matters which are of importance to refer to the principal. If in such a case application is made to a secretary, and trust is reposed in the assertions of a secretary, then the person who so applies and so reposes his trust must take the risks attendant on his course of conduct. Unless in such a case he applies to the directors of the company, it is not unlikely that, as in this case, he will find himself deceived, and without effective remedy: for a misrepresentation falsely made by a secretary, as a person who may in the circumstances of the case be considered to be a mere stranger—his authority being in fact no greater—cannot be held to affect the contract entered into between an applicant for shares and the company. In this case the plaintiff is bound to pay the calls which have been made, and as the company is in liquidation he is liable to be placed on the list of contributories in respect of the shares held by him. It cannot be said that this application for shares was a conditional application, and that the condition has not been fulfilled, for it was a common formal application. The appeal therefore must be dismissed.

BAGGALLAY, L.J.—I assume that the plaintiff was induced to enter into the

contract and to apply for shares owing to the fraudulent statements made by Allen, the secretary of the defendant company. But, assuming this to be so, then if one looks at the application for the allotment of and at the acceptance of the shares, everything appears to have been done in the most regular, formal, and orthodox way. The plaintiff applied to the directors on a regular form, he was allotted shares in the regular way, he has paid calls, and he can make out no case against the company except by relying on the conduct of the secretary. The cause of complaint is that he was informed by Allen, through Bell (who probably was a local agent—but that is not stated), that he would be appointed solicitor to the company if he applied for and took 500 shares. He did so, and he was not appointed solicitor, for another person was appointed, and it proved that the secretary had no authority whatever to make the statement in question. It appears to me that it is impossible to infer any authority on the part of the secretary to make this representation; the facts of this case do not establish any, and there is no general principle which establishes that a secretary has any such authority. No case has been found, although the cases on the subject are numerous, in which the directors of a company have been held liable for the acts of a secretary who has acted as this secretary acted. The case of *The Western Bank of Scotland* v. *Addie* (1), and other cases on the same subject, point out in considerable detail how and in what respect a company is held liable for the acts of its directors and authorised agents; but no case lays down that a company is responsible for misrepresentations made, as this misrepresentation was, by one who is merely a secretary.

On this ground, therefore, I agree with the Master of the Rolls that this appeal must fail. Had it been necessary to decide the point, I am not sure that, as in the case of *The Venezuela Railway Company* v. *Kisch* (7), the delay on the part of the plaintiff would not have been a bar to his claim; but that becomes immaterial.

BOWEN, L.J.—I agree with the other members of the Court. It is obvious that the plaintiff cannot recover the money he has paid as long as he is clothed with the status of a shareholder in the company, and it is obvious that his liability to pay calls must continue until that status has been altered or abolished. It is also obvious that the plaintiff cannot recover any damages from the company or its directors, inasmuch as the misrepresentation which induced him to apply for the shares was not made by any one save Allen, the secretary, so that the company cannot be liable in an action for deceit. The plaintiff alleges that the company cannot retain the benefit of a contract induced by the fraudulent misrepresentation of their agent. But that raises the important question whether the secretary was the agent of the company to make this fraudulent misrepresentation. Allen was the secretary of the company; there is no legal definition of that term, and there is no evidence that he, as secretary, had any such authority; but it is urged that the word "secretary" includes, *prima facie*, the authority to make statements such as this secretary made, and to induce persons to enter into contracts with the company. But it appears to me that, *prima facie*, the functions of a secretary are clerical and ministerial only, that a secretary is not a person authorised to induce persons to take shares, or authorised to get shares taken; it is not his duty to make bargains or to make conditions in respect of shares, he is not an officer authorised to act as an agent in the course of business to do such things; nor is he a person entrusted with the duty of or power of bargaining as to the issue of shares.

Appeal dismissed.

Solicitors — H. G. Smallman, agent for Newlands & Newlands, Jarrow-on-Tyne, for plaintiff; Berry, Binns & Co., for defendant.

(7) Law Rep. 2 E. & I. App. 99.

[IN THE COURT OF APPEAL.]

1885. May 19, 20. } PEARCE *v.* FOSTER AND OTHERS.*

Practice — Discovery of Documents— Privileged Documents—Documents privileged in former Action by same Plaintiff but against different Defendant—Continuance of Privilege.

Documents prepared by the solicitor in an action by P. against D. for use in the conduct of that action, being documents which came into existence for the purpose of private and confidential communications in that action, were privileged in that action from production:—Held (*affirming the judgment of the Queen's Bench Division*), *that these documents were also privileged from production in an action by the same plaintiff against a different defendant, and that as the documents had been once privileged the fact that the enquiry about them was raised in a different action from that in which the privilege originally arose did not destroy the privilege.*

Bullock *v.* Corrie (47 Law J. Rep. Q.B. 352) *approved.*

Appeal from the judgment of the Queen's Bench Division refusing to make an order for the further discovery of documents.

The plaintiff brought an action against the defendants for wrongful dismissal. The defendants justified the dismissal on the ground that the plaintiff had been, unknown to them and against their interest, speculating on the Stock Exchange.

The defendants obtained an order for discovery of documents by the plaintiff, who thereupon made an affidavit stating that he had in his possession or control certain documents relating to the matters in question in the action, but that he objected to produce them on the ground that they were privileged. These documents were described by the plaintiff as being "the papers of my counsel and solicitors in an action in the Chancery Division between me, the above-named J. Pearce, plaintiff, and W. Detmar, defendant, the said papers consisting of briefs of my counsel, instructions to my counsel and solicitors, and other papers dated or written after the commencement of the said action, or in contemplation of, or in and for the conduct thereof." This affidavit being considered insufficient, the plaintiff was ordered to make a further affidavit; and in this further affidavit he stated that these documents were tied together in a bundle and marked, and that they were all documents which came into existence for the use of his counsel and solicitors in the above-named action, or in contemplation of it, and, being confidential documents, were privileged from production in that action, and that having been once privileged the documents continued to be privileged from production.

The plaintiff also stated in an affidavit that the action of *Pearce* v. *Detmar* never proceeded beyond the statement of defence, as Detmar died; that the defendants might inspect the pleadings in that action and copies of certain accounts between himself and Detmar; that no documents or evidence were procured for that action from any third person, and that all the documents which he objected to produce were instructions or drafts of instructions to counsel prepared by his solicitors, counsel's opinions and notes, and memoranda and documents given by him to his solicitors for or during that action, which was an action for an account in respect of stockbroking transactions between himself and Detmar, or partially prepared but not completed owing to the discontinuance of the action.

The defendants applied for an order for discovery by the plaintiff of the documents so tied up in a bundle; but the Master, the Judge at chambers, and the Queen's Bench Division refused the application.

The defendants appealed.

Stirling, and *F. Moulton*, for the appellants.—Documents privileged in one action are not necessarily privileged in another action between the same plaintiff but different defendants. Documents partially prepared are not privileged, because they were not privileged in the former action. Unless the plaintiff establishes that they would disclose the mind of his solicitor no privilege attaches. The privilege is not sufficiently claimed, and no-

* *Coram* Brett, M.R., Baggallay, L.J., and Bowen, L.J.

thing is privileged unless it comes within the strict rule laid down as to privilege between a client and solicitor. *Lyell* v. *Kennedy* (1), *Walsham* v. *Stainton* (2), *Nickel* v. *Jones* (3), *Bullock* v. *Corrie* (4), *Holmes* v. *Baddeley* (5), and *Lord Walsingham* v. *Goodricke* (6) were referred to.

E. Harrison, for the plaintiff.—The affidavits made by the plaintiff shew that none of the documents in respect of which privilege is claimed consist of communications with a third party, but that they are all confidential communications between the solicitor and his client, prepared for use in the action brought by him against Detmar. [He was stopped by the Court.]

BRETT, M.R.—It appears to me that on the true construction of the affidavit now under consideration, the documents referred to in it, for which privilege is claimed, are documents which were prepared by a solicitor for use in an action, which were prepared to be used between counsel, solicitor, and client for the purpose of consultation with reference to and in the conduct of the action: so that the documents came into existence for the very purpose of professional confidence. Where documents are in existence *aliunde*, the mere fact that they are handed over to a solicitor for an action does not, in my opinion, create a privilege with regard to them—as, for instance, the fact of handing over mercantile documents to a solicitor for the purpose of getting advice with regard to them does not create a privilege with respect to them; but where the documents are brought into existence by a solicitor, or through a solicitor, for the purpose of obtaining professional assistance upon them, or advice, or for the conduct of the cause, such documents fall within the class of confidential professional communications, and they are therefore treated as privileged. The documents now under consideration are such documents, for they were in fact brought into existence for the purpose of conducting an action which was then pending; they were therefore then privileged; and, if that be so, I think that the privilege has not ceased to exist because the enquiry which now raises this question is an enquiry in a different action. The case of *Bullock & Co.* v. *Corrie & Co.* (4) is an authority in point, and that decision contains, as it seems to me, a valuable principle. It is clear that the action in which the discovery was sought was a different action from the one in which the documents held to be privileged originated, and it was held that that fact did not destroy the privilege which had existed in the former action. The expressions used by Lord Lyndhurst in *Holmes* v. *Baddeley* (5) shew, I think, that his opinion was the same, for he says: "There are undoubtedly some expressions attributed to the Vice-Chancellor in that case"—he refers to *Bolton* v. *The Corporation of Liverpool* (7)—"and also to the Lord Chancellor, which, literally taken, might lead to the conclusion that they considered the privilege to be confined to the particular suit which was expected or depending when the opinions were taken. But no such question was, with reference to these cases and opinions (the cases and opinions ordered to be produced), sufficiently raised by the answers as stated in the report, and the objection to produce them was rested entirely on other grounds." And it is clear that Lord Lyndhurst thought the suggestion not tenable. I agree with the opinion expressed by the Lord Chief Justice Cockburn, that the privilege which attaches to communications between solicitor and client for the purpose of carrying on litigation, or for the purpose of advice during litigation, should be encouraged, for the reason that if that which was at one time a privileged communication could ever be the subject of compulsory disclosure, that fact would prevent that free communication at the time which is the very foundation of the use and service of the profession of a solicitor to his client. I think, therefore, that the affidavit is sufficient, and that the appeal must be dismissed. I am prepared to adopt the

(1) 53 Law J. Rep. Chanc. 937; Law Rep. 27 Ch. D. 1.
(2) 2 Hem. & M. 1.
(3) 2 Hem. & M. 588, 595.
(4) 47 Law J. Rep. Q.B. 352; Law Rep. 3 Q.B. D. 356.
(5) 1 Ph. 476.
(6) 3 Hare, 122.
(7) 3 Sim. 467.

passage in *Bray on Discovery*, at p. 371, which states that "It would seem clear that the extension of the privilege to all professional communications, whether passing in reference to litigation or not, must cover those which pass in reference to litigation with other persons, or with the same persons at other times."

BAGGALLAY, L.J.—I agree with the conclusion to which the Master of the Rolls has come, and I agree with him that it is of importance not to limit the protection given to this class of documents. At one time I doubted if the affidavit was sufficient, but having had my attention drawn more particularly to the various paragraphs of the affidavit, I think that it is sufficient, regard being had to the circumstances of the two cases. It is clear, I think, that judicial opinion on this point has not been at all times perfectly uniform, and that down to the time of the case of *Lord Walsingham* v. *Goodricke* (6) the view that production should be enforced prevailed, but that since that time there has been a movement in the direction of extending the privilege within the limits indicated in *Wheeler* v. *Le Marchant* (8).

BOWEN, L.J.—I am of the same opinion. I think it is important to remember that this case does not raise any question as to documents the discovery of which would not place in the possession of the parties seeking discovery communications of a class and kind known as professional and confidential, for the documents in question are professional documents, prepared by a solicitor for his client during the course of litigation, so that they would disclose the mind and the advice of the solicitor, and they therefore come within the decision in *Lyell* v. *Kennedy* (1), for they are, strictly speaking, professional documents. The case of *Bullock & Co.* v. *Corrie & Co.* (4) deals with this class of documents; and what was there said was, I think, based upon the case of *Wilson* v. *Rastall* (9). It may possibly not be correct to say that in all cases, and with regard to all purposes, a document once privileged is always privileged; but these documents are within the known doctrine as to privilege.

Appeal dismissed.

(8) 50 Law J. Rep. Chanc. 793; Law Rep. 17 Ch. D. 765.

(9) 4 Term Rep. 753.

Solicitors—Roy & Cartwright, for plaintiff; G. M. Clements, for defendants.

[IN THE COURT OF APPEAL.]

1885. June 10.

PAGE *v.* MORGAN.*

Contract — Sale of Goods—Delivery—Receipt and Acceptance—Statute of Frauds (29 *Car.* 2. *c.* 3), *s.* 17.

The plaintiff sold to the defendant by sample certain wheat, which was put into a barge and sent to the defendant's mill, where it arrived in the evening, and on the following morning was, by order of the defendant's foreman, taken into the mill and there examined with the sample. The defendant then rejected it as not being equal to sample. The wheat was put back into the barge and remained there for some weeks, when it was sold by order of the Court. It was not the custom at the defendant's mill to examine wheat whilst it was in the barges. In an action by the plaintiff to recover damages from the defendant for not accepting the wheat, the jury found that it was equal to sample and that the plaintiff had acted reasonably:— Held, *that there was evidence for the jury of acceptance of the wheat sufficient to satisfy section* 17 *of the Statute of Frauds.*

Kibble *v.* Gough (38 Law Times, N.S. 206) *approved and followed.*

Appeal by the defendant from a decision of the Divisional Court.

Action to recover the price of wheat sold by sample under a verbal contract by the plaintiff to the defendant, and for damages for non-acceptance of the same by the defendant.

The wheat was taken in sacks in a barge to the defendant's mill, where it arrived in

* *Coram* Brett, M.R., Baggallay, L.J., and Bowen, L.J.

the evening. On the following morning some of the sacks were drawn up into the defendant's mill, and there examined by the defendant's foreman with the sample to see whether it was equal to sample—it not being the custom at the mill to examine the sacks whilst in the barges. The defendant then informed the plaintiff that he rejected the wheat as not being equal to sample, and the sacks were returned into the barge. The wheat, which remained in the barge for about six weeks, was subsequently sold by order of the Court.

Bulwer, Q.C., before whom the action was tried at Chelmsford, directed the jury, upon the authority of *Morton* v. *Tibbett* (1) and *Kibble* v. *Gough* (2), that if the defendant took the sacks into the mill merely to see whether they were equal to sample, that constituted acceptance and receipt within the meaning of section 17 of the Statute of Frauds. The jury found that the plaintiff had acted reasonably, and that the goods were equal to sample; and a verdict and judgment for 47*l.* damages for non-acceptance were entered for the plaintiff.

The Divisional Court (Lord Coleridge, C.J., and Cave, J.) refused an application by the defendant for a new trial upon the ground of misdirection and that there was no evidence of non-acceptance to be left to the jury.

The defendant appealed.

E. Morten (with him *Murphy*, *Q.C.*), for the defendant.—There was no evidence to be left to the jury of any acceptance to satisfy the section 17 of the Statute of Frauds. In *Morton* v. *Tibbett* (1) there was an actual receipt of the wheat within the meaning of the section, because there the defendant had dealt with it as if it had been his own property. That case is therefore distinguishable. There must be something more than a mere receipt of the goods—*Benjamin on Sale* (3). Here the wheat was delivered, but there was no acceptance. In *Kibble* v. *Gough* (2) there was an acceptance of the wheat after examination, and the quality alone was complained of. As soon as the wheat was examined here, the delivery was stopped and the wheat was rejected. In *Rickard* v. *Moore* (4) Bramwell, L.J., stated that if that case could not be distinguished from *Kibble* v. *Gough* (2), the latter case was wrongly decided. Even if there was evidence of acceptance there was misdirection, because as directed by the learned Commissioner the jury could not have found that there was no acceptance.

Philbrick, *Q.C.*, and *R. Vaughan Williams*, for the plaintiff, were not called on.

BRETT, M.R.—It seems to me that the principle of law applicable to this case has been laid down in *Kibble* v. *Gough* (2), where I said, "The defence here seems to me the same as if the master had been there at the time and had said, 'I will reserve my right of inspection until to-morrow.' The question for us here is, is there such an acceptance to make the contract binding under the Statute of Frauds? There must be an acceptance and an actual receipt; no absolute acceptance, but an acceptance which could not have been made except on admission of the contract and the goods sent under it." Then follows an absolute statement that *Morton* v. *Tibbett* (1) was rightly decided. Lord Justice Cotton also said, "All that is wanted is a receipt and such an acceptance of the goods as shews that it has regard to the contract; but the contract may yet be left open to objection, so that it would not preclude a man from exercising such a power of rejection." In that case the goods had been taken into the defendant's warehouse and had been left there for a time, but not for such a time as to make it unreasonable for him to exercise his right to reject them, because he kept them for a time short of that during which he was entitled to keep them. The goods were delivered to the defendant, who took actual possession of them and dealt with them. That case, therefore, decides that he had a right to see whether he would reject them or not, and that the jury might find he had accepted them in such a way as to shew that he could not have dealt

(1) 15 Q.B. Rep. 428; 19 Law J. Rep. Q.B. 382.
(2) 38 Law Times, N.S. 206.
(3) At pp. 117, 118 (2nd ed.).
(4) 38 Law Times, N.S. 841.

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with them as he had done unless he was of opinion that he had made a contract for the purchase of them, and that they were delivered in fulfilment of that contract, and that he was actually examining them to see whether they were equal to sample. That being the law, the only question here is, whether there was evidence from which the jury might find that he was entitled to do so. The goods, which were sent to the mill in a barge, arrived in the evening; the next day the defendant's servants took the sacks into the warehouse; and the goods having been taken out of the barge and kept for some time, the defendant's foreman proceeded to open the sacks and examine the wheat. The jury were entitled to find that this was done in order to see whether the wheat was equal to sample; but a reasonable person could only come to the conclusion that a man who so acted feels and admits that he has made a contract for the purchase of wheat which is to be equal to sample, and that it has been delivered, and is being examined to see whether it is equal to sample. He might have done something which would not lead a jury to find that he must have admitted that there was a contract; but here I rely not only on the fact that the wheat was delivered, but also that the sample and bulk were examined together. It is impossible to come to any other conclusion than that by those two acts the defendant admitted he had made a contract for the wheat, and was examining it to see whether it was equal to sample; and that is all that is necessary to entitle the jury to find that he had accepted the wheat so as to satisfy the Statute of Frauds. I think the case of *Kibble* v. *Gough* (2) is a binding authority, and that there was evidence which ought to have been, and was, left to the jury, and that there is no colour for saying that there was misdirection. The case of *Rickard* v. *Moore* (4), in which Bramwell, L.J., threw some doubt upon *Kibble* v. *Gough* (2), cannot be said to have overruled that decision, and his remarks were not made in such terms that they can be said to be binding on this Court.

Baggallay, L.J.—I am of the same opinion. It was decided in *Morton* v. *Tibbett* (1), which was followed by *Kibble* v. *Gough* (2), that there may be an acceptance and actual receipt of goods to satisfy section 17 of the Statute of Frauds, although the acceptance is not such as to preclude the purchaser from saying that the goods are not equal to sample, and therefore from rejecting them. It has been stated that there has been a difference of opinion as to the ground upon which the judgment of Lord Campbell in *Morton* v. *Tibbetts* (1) proceeded; but that decision has been recognised and followed in *Kibble* v. *Gough* (2). Reliance has been placed upon *Rickard* v. *Moore* (4), which was decided after *Kibble* v. *Gough* (2); but that case will, when examined, be found to be substantially different. A remarkable distinction there pointed out by Lord Justice Thesiger is, that in *Kibble* v. *Gough* (2), as in the present case, the jury found that the goods were equal to sample, whereas in *Rickard* v. *Moore* (4) they found that the goods were not equal to sample. If that be so, the question here is whether there was evidence to go to the jury of an acceptance and receipt within the meaning of the decisions. I think that there was such evidence, and that the jury could not have come to any other conclusion than that at which they arrived.

Bowen, L.J.—I am of the same opinion. This case is governed by the principles laid down in *Kibble* v. *Gough* (2), which must now be taken to be a binding authority upon the subject of acceptance and receipt of goods within the meaning of the Statute of Frauds. That case is founded upon a sound commercial basis. Having regard to the language of section 17 of the Statute of Frauds, and the mischief aimed at by the statute, the conclusion one would come to is that the Legislature by "acceptance and receipt" meant such a dealing with the goods as would amount to a recognition of the contract. That is the view taken by the Court in *Kibble* v. *Gough* (2). As regards *Rickard* v. *Moore* (4), the distinction which has been pointed out by my brethren seems to me to be sound. In *Kibble* v. *Gough* (2) the jury found the goods were equal to sample, and it was therefore necessary to decide whether there had been

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an acceptance and receipt within the meaning of the statute. But in *Rickard* v. *Moore* (4) the jury found the goods were not equal to sample, and therefore the only question was whether the goods had been rightly rejected, and the Court held that they were. The language used by Lord Justice Bramwell, upon a secondary point—namely, that there was no acceptance—could not have been meant by him to disturb the decision in *Kibble* v. *Gough* (2), and we have a perfect right to go back to that case and to say that it was rightly decided.

Appeal dismissed.

Solicitors—Clapham & Fitch, for plaintiff; Duffield & Bruty, for defendant.

[IN THE COURT OF APPEAL.]

1885. April 22, 23. SKINNER *v.* THE CITY OF LONDON MARINE INSURANCE CORPORATION (LIMITED).*

Company—Refusal to register Transfer of Shares—Measure of Damages—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 26.

Section 26 *of the Companies Act*, 1867, *is for the protection of a transferor of shares in a registered company, and enables him to compel the company to register the transfer in case the transferee fails to do so. But the section has made no alteration as regards the ordinary contract for the sale of shares in a company, under which a transferor, in consideration of the price of such shares, is bound to execute a valid transfer and hand the certificates to the transferee, whilst the transferee is bound to get the transfer registered.*

The plaintiff, under an alleged agreement that certain shares which he held in a company should be taken by one L. in payment of a debt due from him to L. if such shares were registered, executed a valid transfer of the same and handed the certificates to L. The plaintiff applied to the company under section 26 *of the Companies Act*, 1867, *to register the transfer, but they refused to do so upon the ground that he was indebted to them. The question of his indebtedness was decided in his favour in an action between him and the company, and the transfer was subsequently registered. The company had no notice of the alleged agreement between the plaintiff and L., the transfer being expressed to have been executed for a nominal sum. The market value of the shares having fallen considerably between the date when the transfer was executed and that at which it was actually registered, the plaintiff sought to recover damages from the company for their wrongful refusal to register the transfer:*—Held, *that the plaintiff was only entitled to recover nominal damages, as the company had received no notice of the alleged agreement between him and L., and also because he had suffered no damage either in respect of calls or otherwise from the refusal of the company to register the transfer.*

Appeal by the plaintiff from a decision of the Divisional Court.

The action was brought in the Mayor's Court, London, against the defendant company to recover damages for wrongfully refusing to register a transfer of shares in the company.

The plaintiff, who was the holder of 1,300 shares in the defendant company, agreed to transfer the same to one Levy, to whom he was indebted. The transfer was executed on the 1st of November, 1882, and the certificates of the shares were handed to Levy by the plaintiff. On the 7th of November the transfer, which was expressed to be executed in consideration of the sum of five shillings, was presented by the plaintiff, under section 26 of the Companies Act, 1867, for registration in the name of Levy; but the company refused to register it upon the ground that the plaintiff was indebted to them. The defendants were empowered under the articles of association to refuse to register any transfer if the transferor were indebted to the company; but having failed, in an action brought against the plaintiff, to establish his indebtedness to them, they on the 24th of April, 1884, registered the transfer.

* *Coram* Brett, M.R., Baggallay, L.J., and Bowen, L.J.

At the date of the execution of the transfer the market value of the shares was 26*s.*, but when the transfer was actually registered the value of the shares had fallen to 10*s.*

At the trial of the present action before the Recorder, it was proved that Levy had agreed to accept the shares, in reduction of a debt of 2,000*l.* due to him from the plaintiff, at the market value at the date of the execution of the transfer; but there was no evidence that the defendant company had notice of this agreement. The jury found a verdict for the plaintiff for 1,248*l.* The defendant company afterwards obtained a rule *nisi* to set aside the verdict, and for a new trial upon the ground, *inter alia*, that the damages were excessive.

The Divisional Court (Lord Coleridge, C.J., and Smith, J.) made the rule absolute, but gave the plaintiff leave to appeal as to whether he was entitled to recover damages for the loss sustained by him in respect of the fall in the market value of the shares between the date of the execution of the transfer to Levy and that at which it was actually registered.

Cohen, Q.C., and *Masterman*, for the plaintiff.—The defendants were wrong in refusing to register the transfer of shares. Section 35 of the Companies Act, 1862, gives the Court or Judge power to rectify the register; but that is a matter for their discretion. No debt was in fact due from the plaintiff to the defendant company, and consequently their refusal to register would give him a right of action against them, for the transferor of shares is liable to the transferee for the price of the shares if he does not get the transfer registered—*Wilkinson* v. *Lloyd* (1). The transferor can now apply, under section 26 of the Act of 1867, to a company to register the transfer, and that section was intended to protect him in the event of the transferee failing to register the transfer. The plaintiff has a remedy apart from the Companies Acts, and this was assumed in *Ward and Henry's Case* (2)—so that he is entitled to more than nominal damages. *Buckley on the Companies Acts* (3) and *Lindley on Partnership* (4) were also referred to.

Lockwood, Q.C., and *Moulton*, for the company.—The company, in the absence of notice of the agreement between Levy and the plaintiff, were entitled to treat the nominal sum of 5*s.* as the consideration for the transfer, and therefore are only liable for nominal damages. In *Wilkinson* v. *Lloyd* (1) the transferor could not compel the company to register the transfer, but here the transferee could get the transfer registered. It is not permissible, so far as the company are concerned, to go behind the ordinary contract of sale as evidenced by the transfer.

Cohen, Q.C., replied.

BRETT, M.R.—In this case the plaintiff brought an action against the defendant company for having refused an application made by the plaintiff, under section 26 of the Companies Act, 1867, to enter upon their register the name of a person, Levy, to whom the plaintiff alleged that he had transferred certain shares and to whom he had handed the certificates. His case is that he made a valid transfer of the shares to Levy, and under section 26 had called upon the company to enter his name upon the register, and that the company were therefore wrong in refusing to do so at his request. The plaintiff proved his cause of action. No doubt the company had a right to refuse to register the transfer if the plaintiff had been indebted to them; they took the risk here of a debt being due, and the moment it was ascertained that no such debt was due it follows that at the time when the application was made under the section they were in the wrong and committed a breach of their statutory duty. Whether that is also to be considered as a breach of contract is immaterial. It therefore seems to me that the plaintiff is entitled to nominal damages at least; but it is also alleged that he is entitled to substantial damages. It is clear that upon a breach of duty by the company to a transferor there may be more than nominal damages. The company were under an obligation to the plaintiff to register the transfer to his transferee;

(1) 7 Q.B. Rep. 27; 14 Law J. Rep. Q.B. 165.
(2) Law Rep. 2 Chanc. 431, 438.
(3) At pp. 90, 91. (4th ed.).
(4) Vol. i. p. 712 (4th ed.).

and by not doing so under certain circumstances, substantial damages may be sustained by the transferor, for he may be liable to calls if his name is left upon the register. If that had happened after the refusal of the company to enter the name of the transferee upon the register, the transferor would be entitled to something more than nominal damages. But there was no evidence here of that class of damages, and the plaintiff cannot therefore recover in respect of such damages. Moreover, it is not contended that upon a new trial there would be any such evidence. The plaintiff, however, seeks to recover in respect of a loss sustained by him by reason of a fall in the market value of the shares between the time when the company ought to have registered the transfer and the time when they did actually register it. That raises the question whether, assuming the particular contract alleged to have been made between the plaintiff and Levy was proved, and that in fact the plaintiff did lose the market value of the shares, he can make the company liable for the breach of contract which was occasioned by the refusal of the company to register the transfer. If the contract was not an ordinary contract of purchase and sale, but was a special contract, the case would fall within the principle laid down in *Hadley* v. *Baxendale* (5), and the company could not be made liable for damage arising from a breach of such special contract, unless the terms of such contract had been made known to them. It cannot here be said that the terms of that contract had been brought to their notice, nor were they bound to anticipate that the contract was more than the ordinary one of purchase and sale. That raises the question what is the ordinary contract between the transferor and transferee of registered shares in such a company as the present one. The usual contract before the Companies Act, 1867, was that stated by Lord Cairns in *Ward and Henry's Case* (2), that where there is a contract for the sale of shares in a registered company, and the company are bound to register the transfer, the ordinary contract is that the seller will, in consideration of the price received, execute a valid transfer, and hand over the certificates, and so do all that he can to enable the transferee to insist upon his right to have the contract carried out; and, moreover, the transferee, as between himself and the transferor, binds himself after receipt of the executed transfer and certificates to pay the agreed price and get the transfer registered, and so clear the transferor from any liability which might arise by reason of his name being still left upon the register. Then comes the question whether that contract has been altered by section 26 of the Companies Act, 1867; but it seems to me that it has not, and that it is still the duty of the transferee, as between himself and the transferor, to get himself registered, and that the section was enacted for the protection of the transferor in case the transferee failed to perform his contract and by not registering leave the transferor liable. The enactment was therefore made purely for the protection of the transferor, and empowered him to insist upon the company registering the transfer. If that be so, the effect upon the transferor of the refusal of the company to act under section 26 would, unless they had had notice of some peculiar or specific contract, be only that the company would be liable in respect of such damages as would be suffered by him if the contract between him and the transferee was an ordinary contract. The mere act of the company in not registering the name does not affect the rights of the transferor as between himself and some other person if he has not given notice to the company of those rights under the contract. The plaintiff, therefore, cannot recover from the company the difference between the market value of the shares by reason of the peculiar terms in the contract, unless they had been given notice of that contract either before or at the time when they committed a breach of the contract. It therefore follows that as in this case the plaintiff cannot recover that head of damages, he can only recover nominal damages; and as that is the only question to be left to the jury, it was agreed that it would be useless to send the case back

(5) 9 Exch. Rep. 341; 23 Law J. Rep. Exch. 179.

for a new trial. The verdict should therefore be entered for nominal damages.

BAGGALLAY, L.J.—I am of the same opinion. When the transfer was left at the office of the company, they were only called on to take notice of its express form—namely, that it was a transfer of shares. But they were bound to register it at once. The company asserted that the plaintiff or his partner was indebted to them, and relied upon the terms of one of their articles of association, under which they were empowered to refuse to register if the transferor was indebted to them—and in such a case that would be a perfect answer for not registering. But inasmuch as the claim asserted by them was an unfounded claim, they were undoubtedly wrong in refusing to register, and would therefore be liable to the plaintiff. Then, as to the question of the measure of damages, it was alleged that although upon the face of the actual transfer the consideration for such transfer was only 5*s.*, yet there was a collateral agreement between the transferor and transferee that the transferor should receive the market value of the shares on the day of the transfer. Certain rights may exist between the transferor and the transferee under the collateral agreement, but it cannot be said that the company are to have notice of that agreement. A transfer of shares for a nominal consideration is of constant occurrence, and it does not appear to me that the surrounding circumstances relied on by the plaintiff were such as to put the company upon enquiry. The company therefore are only liable for nominal damages for having refused to register.

BOWEN, L.J., concurred.

Appeal dismissed.

Solicitors—Blewitt & Tyler, for plaintiff; W. Webb & Co., for defendants.

[IN THE COURT OF APPEAL.]

1885. June 13. } WATERHOUSE AND COMPANY *v.* GILBERT (GILBERT *claimant*).*

Practice—Interpleader—Summary Decision—Appeal—Leave of Court or Judge—Order LVII. rules 8 *and* 11—*Common Law Procedure Act*, 1860 (23 *&* 24 *Vict. c.* 128), *s.* 17—*Appellate Jurisdiction Act*, 1876 (39 *&* 40 *Vict. c.* 59), *s.* 20.

In view of section 20 *of the Appellate Jurisdiction Act*, 1876, *and section* 17 *of the Common Law Procedure Act*, 1860, *even when read with Order LVII. rule* 11, *there is no appeal from the High Court to the Court of Appeal upon a summary disposal of a claim in interpleader under Order LVII. rule* 8, *with or without leave to appeal being given.*

Appeal of the plaintiffs from Lord Coleridge, C.J., and Cave, J., affirming Denman, J., and the Master, upon a disposal in a summary way of the merits of a claim in a sheriff's interpleader under Order LVII. rule 8.

The Master decided in favour of the claimant, and directed the sheriff to withdraw, and at the same time gave leave to appeal under Order LVII. rule 11. Denman, J., on appeal, decided that no appeal lay, the Master's decision being final. The Divisional Court dismissed the appeal mainly on the ground that an agreement had been entered into between the claimant and the plaintiffs that there should be no appeal.

Order LVII. rule 11 provides that, "except where otherwise provided by statute, the judgment in any action or on any issue ordered to be tried or stated in an interpleader proceeding, and the decision of the Court or a Judge in a summary way under rule 8 of this Order, shall be final and conclusive against the claimants and all persons claiming under them, unless by special leave of the Court or a Judge, as the case may be, or of the Court of Appeal."

J. F. Torr, for the claimant, took the preliminary objection that there was no appeal.—The appeal by leave under rule

**Coram* Brett, M.R., Baggallay, L.J., Cotton, L.J., Lindley, L.J., Bowen, L.J., and Fry, L.J.

11 does not, in regard to decisions in a summary way, operate so long as section 17 of the Common Law Procedure Act, 1860, stands unrepealed. That section provides that the decision of a Court or Judge in a summary way in interpleader shall be final and conclusive; and section 20 of the Appellate Jurisdiction Act, 1876, further enacts that "where by Act of Parliament it is provided that the decision of any Court or Judge, the jurisdiction of which Court or Judge is transferred to the High Court of Justice, is to be final, an appeal shall not lie from the decision of the High Court of Justice to the Court of Appeal." Section 17 of the Common Law Procedure Act, 1860, is expressly excepted out of the repeal of that Act in the Procedure Law Revision Act, 1883.

E. Garnet Man and *W. F. Barry*, for the plaintiffs.—Rule 11 gives an appeal with leave of the Court or Judge, and that leave once given the appeal can be carried to the Court of Appeal. The rule repeals the existing statutes, as it has power to do, the question of appeal being procedure.

Cock, for the sheriff.

BRETT, M.R.—We are of opinion that section 11 of Order LVII. has not in any way affected the 20th section of the Act of 1876. Reading section 20 of the Act of 1876, and applying to it section 17 of the Act of 1860, we are all of opinion that in such a case as the present there is no appeal from the decision of the Divisional Court to this Court, or power in the Divisional Court or in this Court to give leave to appeal to this Court.

Appeal dismissed.

Solicitors—G. W. Churchley, for plaintiffs; H. W. Chatterton, for claimant; W. W. Burchell, for sheriff.

1885. May 18. } MC CARTAN *v.* THE NORTH-EASTERN RAILWAY COMPANY.

Railway Company—Carrier—Contract—Effect of Conditions and Time Bills—Exemption from Liability—Through Communication — Want of Punctuality — Damages.

The plaintiff took four third class tickets at the defendants' station at Durham by the 2.11 *p.m. train for Belfast via Leeds, Midland, and Barrow, which was printed on the tickets, and it was further stated that they were "issued subject to regulations in time table." At the end of the time bills there were a number of pages entitled "Connection with other railways," and one of such pages was printed "Through communication between the North-Eastern Line and Ireland, Belfast via Leeds and Barrow," from which it appeared that the* 2.11 *p.m. train should arrive at Leeds at* 4.45, *and leave there at* 5.10 *by the Midland Company's line. The Midland Company's station at Leeds adjoins the North-Eastern station, but is a separate building. The train by which the plaintiff and his family travelled did not reach Leeds till* 5.22, *or thirty-seven minutes late, and the Midland Company's train having left at the proper time, the plaintiff's family were unable to proceed to Belfast that night, and were compelled to put up at an hotel at Leeds.*

The conditions in the defendants' time tables comprised the following:—"The hours stated in these time tables are appointed as those at which it is intended, as far as circumstances will permit, the passenger trains should arrive at and depart from the several stations; but their departure or arrival at the times stated, or the arrival of any train passing over any portion of the company's lines in time for any nominally corresponding train on any other portion of their lines, is not guaranteed; nor will the company, under any circumstances, be held responsible for delay or detention, however occasioned, or any consequences arising therefrom. The issuing of tickets to passengers to places off this company's lines is an arrangement made for the greater convenience of the public; but the company will not be held responsible for the non-arrival of this

company's own trains in time for any nominally corresponding train on the lines of other companies, nor for any delay, detention, or other loss or injury whatsoever which may arise therefrom, or off their lines."

In an action brought in the County Court to recover the expenses to which the plaintiff had been put by an alleged breach of contract on the part of the defendants, the County Court Judge held that there was an implied contract that the defendants would use reasonable efforts to ensure punctuality, and that the defendants had failed to shew that the delays arose from no want of reasonable efforts; accordingly he gave judgment for the plaintiff for the amount claimed:—Held, *upon appeal to the Divisional Court, that the judgment given in the County Court must be reversed, inasmuch as the conditions formed part of the contract, and the true construction of such conditions was that the defendants refused to guarantee the punctuality of their trains according to the times mentioned in the tables, from whatever cause the irregularity or want of punctuality might arise.*

This was a Special Case stated by way of appeal on the part of the defendants from a judgment in an action brought against them by the plaintiff in the Durham County Court under the circumstances hereinafter stated.

The plaintiff, on the 24th of June, 1884, took four third class tickets for his wife and family for Belfast at the Durham Railway Station to enable them to journey by a train leaving Durham at 2.11 p.m. for "Belfast *via* Leeds, Midland Railway, and Barrow," such tickets being issued "subject to regulations in time tables." On the outside of the company's time table for that month appeared the following conditions, "Notice.—The hours or times stated in these tables are appointed as those at which it is intended, so far as circumstances will admit, the passenger trains should arrive at and depart from the several stations; but their departure or arrival at the times stated, or the arrival of any trains passing over any portion of the company's lines in time for any nominally corresponding train on any other portion of their line, is not guaranteed; nor will the company, under any circumstances, be held responsible for delay or detention however occasioned, or any consequences arising therefrom. The issuing of tickets to passengers to places off this company's lines is an arrangement made for the greater convenience of the public; but the company will not be held responsible for the non-arrival of this company's own trains in time for any nominally corresponding train on the lines of other companies, nor for any delay, &c." In the company's time table there is a page headed "Through communication between the North-Eastern Line and Ireland, Belfast *via* Leeds and Barrow," from which it appears that the 2.11 p.m. train from Durham should arrive at Leeds at 4.45, and depart from there for Barrow at 5.10 by the Midland Company's line, thus giving the plaintiff's family twenty-five minutes spare time had the North-Eastern trains been punctual; but instead of arriving at Leeds at the time stated, the train did not arrive till 5.22, or thirty-seven minutes late, and in consequence of such late arrival the plaintiff's family missed the 5.10 p.m. Midland train, and were unable to proceed to Belfast that night, and were compelled to put up at an hotel in Leeds, thereby incurring hotel expenses to the amount of 3*l.* 2*s.* 8*d.*, to recover which the action was brought.

At the close of the plaintiff's case, the defendants, relying on the conditions in the time tables, submitted there should be a nonsuit. The County Court Judge declined to nonsuit, and evidence was called for the defendants with a view of, if possible, explaining the delays.

The County Court Judge held that there was an implied contract that the defendants would use reasonable efforts to ensure punctuality, and that though slight delays might not be evidence of a want of reasonable effort, yet lengthy or unreasonable delays called upon the company to shew that they arose from no want of reasonable effort; and being of opinion that no satisfactory explanation had been given for the delay, he gave judgment in favour of the plaintiff. The defendants appealed.

Meysey Thompson, for the defendants (the appellants).—The defendants are en-

titled to the judgment of the Court. It is plain from the case of *Le Blanche* v. *The London and North-Western Railway Company* (1) that the facts and documents which formed the contract were the taking and granting of the ticket, the time table, and the conditions. The words, "nor will the company, under any circumstances, be held responsible for delay or detention however occasioned," as well as the other portions of the conditions, are amply sufficient to exempt the defendant company from all liability. He also cited *Haigh* v. *The Royal Mail Steamship Company* (2), *Woodgate* v. *The Great Western Railway Company* (3), *Austin* v. *The Manchester, Sheffield, and Lincolnshire Railway Company* (4), and *Peek* v. *The North Staffordshire Railway Company* (5).

Meek, for the plaintiff.—If the contention of the railway company is correct that the notice on the back of their time tables absolves them from all liability, then the result is that the company can start their trains as and when they like. In *Woodgate* v. *The Great Western Railway Company* (3) the railway company excepted cases where the delay was owing to the fault of their own servants, and the conditions threw on the plaintiff the onus of proving wilful misconduct by the railway company. The judgment of the Court of Appeal in *Le Blanche* v. *The London and North-Western Railway Company* (1) is important as shewing that the company were bound to use all reasonable efforts to carry out their contract with the plaintiff. The words "intended as far as circumstances will permit" clearly indicate an intention on the part of the company not to exclude themselves from all liability.

HUDDLESTON, B.—I really entertain no doubt upon the case before us. It seems to me to be quite clear that the judgment of the County Court Judge must be set aside and the judgment entered for the defendants. We must look here at what is the contract; and the contract is to be collected from the ticket, the time tables, and the conditions, and we must construe them with the best powers which we possess.

Now, it is quite obvious that it was the intention of the railway company to exclude themselves from every species of liability that they could exclude themselves from. They had the advantage of previous cases decided in this and other Courts from which they might be able to draw up their conditions, and I have no doubt that they availed themselves of that.

It is quite clear, since the case of *Haigh* v. *The Royal Mail Steam Packet Company* (2), that if a company use apt words for the purpose, they may make a contract excluding themselves from all liability. Therefore, the only question here is, whether they have used such words.

Now Mr. Meek has ingeniously argued that some of the words here are indicative of an intention on the part of the company not to exclude themselves from such liability. I really cannot agree with him. I must construe these words to the best of my ability, and I do not feel myself pressed at all by the arguments or the judgments in the case of *Le Blanche* v. *The London and North-Western Railway Company* (1) Here I look at the words of the condition, which run as follows: "The hours or times stated in these tables are appointed as those at which it is intended," &c. I pause here to notice Mr. Meek's contention that the word "intended" shews that was their intent. I rather gather that the language used is of a somewhat ambiguous character, and means this—namely, "we intend to do so, if we can, but we do not intend to be bound by it." Then the condition goes on, "so far as circumstances will permit, the passenger trains should arrive at and depart from the several stations; but their departure and arrival at the time stated, or the arrival of any train passing over any portion of the company's lines in time for any nominally corresponding time on any other portion of their lines, is not guaranteed." That is explicit. That means, "We intend to run these trains according to these tables; we do not guarantee their departure or arrival." But, then, lest by any chance an ingenious argument might

(1) 45 Law J. Rep. C.P. 521; Law Rep. 1 C.P. D. 286.
(2) 52 Law J. Rep. Q.B. 640.
(3) 51 Law Times, 826.
(4) 10 Com. B. Rep. 454; 21 Law J. Rep. C.P. 179.
(5) 10 H.L. Cas. 473; 32 Law J. Rep. Q.B. 241.

have been raised upon that portion of the condition, these words follow—and these words are absolutely clear and beyond all doubt—"nor will the company, under any circumstances, be held responsible for delay or detention." Then, to make certainty doubly sure, it says, "however occasioned, or any circumstances arising therefrom." Therefore that says, "We intend to do this; but we will not guarantee the departure or arrival at the times mentioned, and under no circumstances will the company hold themselves responsible for delay or detention, however occasioned." I cannot really understand how more specific words than those could be used. Then the condition goes on, "the issuing of tickets to passengers off this company's lines is an arrangement made for the greater convenience of the public; but the company will not be held responsible for the non-arrival of this company's own trains in time for any nominally corresponding trains on the lines of other companies, nor for any delay, detention, or other loss or injury whatsoever which may arise therefrom, or off their lines." Then follow these words, which Mr. Meek contends—and I think properly contends—should be read with the rest of the condition, although it does not seem, in my judgment, to alter it, "or for the acts or defaults of other parties, nor for the correctness of the times over the lines of other companies." That, in substance, is this: "We give you tables, we state our intention that the train shall arrive in correspondence with the statement in the tables; we will not guarantee it; under no circumstances will we be responsible for delay or detention, however it may be occasioned; and although it may happen upon any occasion that we do not arrive in time for the corresponding train, yet we will not be liable for that; nor will we be liable for the acts or defaults of other parties, nor for the correctness of the times over the lines of other companies." It seems to me, therefore, ingenuity could not have devised better means of meeting every possible case than is done by means of these words.

Now, we are pressed by the authority of *Le Blanche* v. *The London and North-Western Railway Company* (1). With reference to Le Blanche's case, there was a difference of opinion upon the Bench. The sheriff found his verdict for the plaintiff, and then the Divisional Court upheld that judgment. Then the Appeal Court upheld the judgment of the Divisional Court. But by some strange mistake in the report, it seems to be stated that the Appeal Court reversed the decision of the Divisional Court. I think that must arise out of the fact that they granted a new trial on the question of damages. I do not think the report is exactly correct when it says "judgment reversed." It was not reversed—that is to say, they thought the question of the damages was a proper question. But it seems to be quite clear that the whole judgment of the majority of the Court was to this effect, that the very introduction of those words, "every attention shall be used to insure punctuality," meant to say if they did not carry out the intention so as to ensure punctuality, they would be liable. That seems to me, if I may take the liberty of saying so, reasonable enough. That seems to be the obvious meaning. But that has no applicability to this case, because the very presence of those words in the case of *Le Blanche* v. *The London and North Western Railway Company* (1), and their absence in this case, works a distinction between that case and this.

Now, in the case of *Woodgate* v. *The Great Western Railway Company* (3), it seems to me that the whole argument and the whole judgment in that case did not turn upon the construction of the condition; it seemed to be conceded that the condition would be binding, and that it was a good condition, and would exclude the liability of the company. Therefore, so far, it is an argument in favour of Mr. Meysey Thompson's contention in this case. But in the case of *Woodgate* v. *The Great Western Railway Company* (3) the whole question turned upon whether, first, the plaintiff was fixed with the condition by reading the terms on the card or ticket, or whatever it was—whether he would be liable to be fixed with the knowledge of the condition; and the next was whether there was not such misconduct on the part of the railway company as was contemplated by the company themselves in these

conditions not to exclude them from liability.

I therefore think the cases do not support Mr. Meek's arguments, and we must fall back on what is the real meaning of these words. Upon that point I have no doubt whatsoever. I am of opinion that the judgment of the learned County Court Judge was wrong, and that judgment in this case must be entered for the defendants.

WILLS, J.—I am of the same opinion. Having given every possible attention to the able argument of Mr. Meek, I entertain no doubt whatever what our judgment ought to be.

When you have a contract to construe, the best thing to do is to see what it says before you begin to see what other people have said in other cases and under other circumstances and what construction has been put on other words. It seems to me the language here adopted is obviously intended, and not only intended but calculated, to convey the notion that the company refused to guarantee the punctuality of their trains according to the times mentioned in the tables, and from whatever cause the irregularity or want of punctuality might arise. If I were to sit down and try and frame conditions which should say what the company meant to say—namely, that they put their figures on these time tables with the intention and hope that the scheme there indicated should be more or less accurately realised, but that they refused to contract on the footing of keeping these trains absolutely to their times—I really do not know what words I should select which could more clearly indicate such an intention. That is the impression created on my mind as to what the real meaning and intention of these words were, and the way in which I think they ought to be understood by any person reading them fairly. Then, is there any authority to prevent one coming to the conclusion which these words to my mind seem to indicate? Surely not. In *Le Blanche* v. *The London and North-Western Railway Company* (1), which has been principally insisted upon, the conditions were perfectly different. It consisted of two parts, one of which was a positive statement that every effort will be used to ensure punctuality. Those are, *prima facie*, words of contract. The Court held that those words being inconsistent with the unlimited indulgence preserved to the company by the subsequent words, that one part must give way, and they said that the subsequent part must give way to the first part. Lord Justice Mellish says the words "every attention will be paid to ensure punctuality as far as practicable" must be treated as part of the contract, and as modifying every other statement contained in the conditions. It seems to me that in the present case there is no such difficulty, and there is no difficulty whatever in reconciling the various portions of the condition, or notice, or whatever you like to call it. The first is, "we intend, and we hope, and we mean, as far as circumstances will permit, to keep these times; but, mind you, we do not guarantee anything."

Now, as regards the decision in *Woodgate* v. *The Great Western Railway Company* (3), that simply, as far as this matter is concerned, seems to me to leave it where it would otherwise have been. The Court held there that the company were protected from everything except wilful misconduct of their servants. But that has very little bearing on the present case. All I can say is that, in my opinion, the words of this condition are clear, and I can find no authority to prevent me from giving the natural effect and meaning to the language which I have to construe.

For these reasons I concur in the judgment which has been delivered by my brother Huddleston, and I think the defendants must have the verdict and judgment entered for them.

Appeal allowed. Judgment for defendants without costs.

Solicitors — Crossman, Crossman & Prichard, agents for W. H. Oliver, Durham, for plaintiff; Williamson, Hill & Co., agents for George S. Gibb, for defendants.

1885. June 9. WALTER EVANS JACKSON (*trading as* W. E. JACKSON AND COMPANY) *v.* E. C. KRÜGER (*trading as* KRÜGER AND COMPANY).

Practice—Objection for Want of Parties—Rules of Court, 1883, *Order XVI. rule* 11—*Stay of Proceedings.*

Under Order XVI. rule 11 *of the Rules of Court*, 1883, *no person can be added as a plaintiff to an action without his written consent.*

The plaintiff brought an action upon a contract against the defendant, who insisted that one L. should be joined as a co-plaintiff as being a party to the contract, or, in the alternative, that all proceedings in the action should be stayed until he was so joined:—Held, *that inasmuch as L. had not consented to have his name added as a co-plaintiff, the Court had no right by a roundabout process to make an order which would practically override the provisions of Order XVI. rule* 11.

This was an appeal from the decision of Mathew, J., given at chambers, whereby he refused an order that one Percy Lofthouse be joined as a co-plaintiff in the action, or, in the alternative, co-defendant in the action, he being a party to the contract upon which the action was brought, and refusing likewise a stay of proceedings in the action until he be so joined.

The plaintiff's claim was for differences in account for goods sold on defendant's account by the plaintiff as broker. The defendant pleaded several defences, one of which was that if there was any contract at all it was with the plaintiff and Lofthouse.

Chitty, for the defendant, in support of the appeal.—The defendant's contention is that if there was any contract at all it was with the plaintiff and Lofthouse; the defendant is therefore entitled to bring Lofthouse before the Court in some form. There is no longer any plea of abatement—Order XXI. rule 20; but the objection really is nonjoinder of a plaintiff under Order XVI. rule 11 (1).

[GROVE, J.—You cannot make a man a plaintiff without his consent.]

Then the defendant asks that all proceedings in the action may be stayed until the necessary consent is given. He cited *Sheeham* v. *The Great Eastern Railway Company* (2), *Werdeman* v. *Société Générale D'Electricité* (3), *Hunter* v. *Young* (4), and *Kendall & Co.* v. *Hamilton* (5).

L. G. Pike appeared for the plaintiff, but was not called upon to argue.

GROVE, J.—I am of opinion that this appeal must be dismissed. The application is to join a party as plaintiff to an action under Order XVI. rule 11. [His Lordship read the rule.] The words are very explicit: "No person shall be added as a plaintiff suing without a next friend, or as the next friend of a plaintiff under any disability, without his own consent in writing thereto." The rule goes on to say that "every party whose name is so added as defendant shall be served with a writ of summons, or notice in manner hereinafter mentioned, or in such manner as may be prescribed by any special order,

(1) By Order XVI. rule 11 of the Rules of Court, 1883, it is provided that "No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of parties, and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The Court or Judge may, at any stage of the proceedings, either upon or without the application of either party, on such terms as may appear to the Court or a Judge to be just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out, and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added. No person shall be added as a plaintiff suing without a next friend, or as the next friend of a plaintiff under any disability, without his own consent in writing thereto. Every party whose name is so added as defendant shall be served with a writ of summons, or notice in manner hereinafter mentioned, or in such manner as may be prescribed by any special order, and the proceedings as against such party shall be deemed to have begun only on the service of such writ or notice."

(2) 50 Law J. Rep. Chanc. 68; Law Rep. 16 Ch. D. 59.

(3) Law Rep. 19 Ch. D. 246.

(4) 48 Law J. Rep. Exch. 689; Law Rep. 4 Ex. D. 456.

(5) 48 Law J. Rep. Q.B. (H.L.) 705; Law Rep. 4 App. Cas. 504.

and the proceedings as against such party shall be deemed to have begun only on the service of such writ or notice." Now Mr. Chitty has asked us to add the name of a plaintiff without his consent, which it seems to me we have no power to do. Mr. Chitty has also asked us, in the alternative, to stay proceedings; but if we did that, we should be doing by a side wind, and in an irregular manner, what the Act says shall not be done. I think the application must be refused on the ground that the required consent has not been given, and that we ought not by an indirect mode to deprive the plaintiff of pressing his action until he gets a consent which he has not at present got. We have really not enough materials upon which to act; but what Mr. Chitty requires may be done, if thought proper, by the Judge at the trial.

DENMAN, J.—I am of the same opinion. The appeal is brought from an order of Mr. Justice Mathew refusing to order Lofthouse's name to be named as a plaintiff, or, in the alternative, to be added as a co-defendant. Now it would of course be an idle proceeding to bring in Lofthouse as a co-defendant; but Mr. Chitty has argued that until consent has been given by Lofthouse to have his name added as a plaintiff under the provisions of Order XVI. rule 11, this Court has the power, and ought to exercise it, of staying proceedings in the action. I do not go so far as to say that, if in a particular case extreme misconduct were shewn, the Court might not allow justice to be done in a roundabout manner; but, except at all events in a very extreme case, this Court ought not to allow a course to be pursued which would practically repeal the rule. All we know here is that the defendant has stated that Jackson and Lofthouse were joint contractors. The appeal must therefore be dismissed, with costs.

Appeal dismissed.

Solicitors—Torr, Janeways, Gribble & Oddie, agents for E. E. Salmon, Bristol, for appellants; Paddison, Son & Co., for respondent.

[IN THE COURT OF APPEAL.]

BANKRUPTCY. 1885. June 19. } *In re* HOME; *ex parte* EDWARDS.*

Bankruptcy — Practice — Proceedings pending at the time of the coming into force of the Act of 1883—*Jurisdiction of Registrars—Validity of Bankruptcy Rules,* 1883—*Rule* 264—46 *&* 47 *Vict. c.* 52. *s.* 169.

The jurisdiction which Registrars in bankruptcy had by delegation or otherwise under the Bankruptcy Act, 1869 (32 *&* 33 *Vict. c.* 71), *is preserved by* 46 *&* 47 *Vict. c.* 52. *s.* 169, *sub-s.* 3, *in respect of proceedings pending when the latter Act came into operation on the* 1*st of January,* 1884*; and rule* 264 *of the Bankruptcy Rules,* 1883, *which provides for the exercise of their jurisdiction, is a valid rule, and is properly made pursuant to section* 127 *of the Bankruptcy Act of* 1883.

Appeal from the decision of the Registrar upon a motion by the trustee in bankruptcy of one Home seeking to have a settlement made by the bankrupt declared void. The proceedings in this bankruptcy were commenced under the Act of 1869, and were pending on the 1st of January, 1884, when the Act of 1883 (46 & 47 Vict. c. 52) came into operation.

The debtor Home was adjudicated bankrupt on the 21st of November, 1883. The trustee in bankruptcy was appointed on the 28th of December, 1883. In July, 1884, the trustee in bankruptcy served on the trustees of a settlement which Home had made in February, 1883, notice of a motion to have the settlement declared void. This motion was heard by the Registrar, who would have had jurisdiction in the matter if the Bankruptcy Act, 1869, had not been repealed. The trustees of the settlement objected to the jurisdiction of the Registrar to hear the motion. The Registrar decided that he had jurisdiction, and heard the motion. The trustees appealed from the decision of the Registrar both on the question of the jurisdiction and on the merits.

* *Coram* Brett, M.R., Baggallay, L.J., and Bowen, L.J.

In re Home; ex parte Edwards, App.

E. C. Willis, Q.C., and *F. C. Willis*, for the appellants.—The Registrar heard this motion pursuant to rule 264 (1) of the Bankruptcy Rules of 1883, which have been made pursuant to 46 & 47 Vict. c. 52. s. 127; but that rule is *ultra vires*, and is contrary to the provisions of sections 93, 94, 98, and 99 of the Act of 1883. No doubt the Registrar could have heard this motion had the Act of 1869 not been repealed by the Act of 1883 which came into operation on the 1st of January, 1884.

[BRETT, M.R.—Does not section 169, sub-section 3 (2), of the Act of 1883 preserve the power of the Registrar in such a case as this?]

The Registrar was the delegate of the Chief Judge; but the Chief Judge no longer exists: there is now no London Court of Bankruptcy: so that the Registrars cannot be the delegates of a Judge whose office and Court have both been abolished.

[BAGGALLAY, L.J., referred to 46 & 47 Vict. c. 52. s. 127. BOWEN, L.J., referred to *Hough* v. *Windus* (3).]

The Act of 1883 intended to put an end to delegation. Section 169, sub-section 3, preserved process, but not the authority of the persons who under the Act of 1869 were authorised to hear and decide such matters. The word "proceedings" in section 169, sub-section 3, refers to the mode in which matters are to be brought before the Court by way of notice and motion, but not to the persons who had to hear such matters.

[BRETT, M.R.—Mathew, J., has decided this point in *In re Jones; ex parte Chandler* (4).]

It is sought in this case to review that decision.

Pollard and *D. Walker*, for the trustee in bankruptcy, were not called on.

BRETT, M.R.—I cannot doubt but that the Registrar had jurisdiction to act in this case. The terms of 46 & 47 Vict. c. 52. s. 169, sub-s. 3, are plain, "Notwithstanding the repeal effected by this Act, the proceedings under any bankruptcy petition, liquidation by arrangement, or composition with creditors under the Bankruptcy Act, 1869, pending at the commencement of this Act shall, except so far as any provision of this Act is expressly applied to pending proceedings, continue, and all the provisions of the Bankruptcy Act, 1869, shall, except as aforesaid, apply thereto, as if this Act had not been passed." These words preserve in cases such as this the jurisdiction of the Registrars, as if the Bankruptcy Act of 1883 had not been passed. I shall quote from and adopt the judgment of Mr. Justice Mathew delivered in *In re Jones; ex parte Chandler* (4), where he says, "In my opinion it is an object of the new Act to maintain the jurisdiction of the Registrar as to pending business, and the intention and meaning of the 169th section is that pending proceedings under the Act of 1869 shall go on as before; and this is provided for by rule 264, which is properly made according to section 127 of the new Act."

The jurisdiction of the Registrar does not depend on rule 264, it depends on section 169 of the Act; but rule 264 is made to carry out the powers given by section 169. The objection therefore fails.

BAGGALLAY, L.J., and BOWEN, L.J., concurred.

Appeal dismissed.

Solicitors—G. S. Hall, for appellant; Lyne & Holman, for respondent.

(1) 46 & 47 Vict. c. 52 gives power, by section 127, to make general rules for carrying into effect the objects of the Act.

Rule 264: "In any proceeding commenced under the Bankruptcy Act, 1869, or any previous Bankruptcy Act, a Registrar shall, unless and until the Judge otherwise orders, continue to have and exercise all powers and jurisdiction (not otherwise provided for by the Act or these rules) which he had by delegation or otherwise at the commencement of these rules."

(2) 46 & 47 Vict. c. 52. s. 169, sub-s. 3: "Notwithstanding the repeal effected by this Act, the proceedings under any bankruptcy petition, liquidation by arrangement, or composition with creditors under the Bankruptcy Act, 1869, pending at the commencement of this Act shall, except so far as any provision of this Act is expressly applied to pending proceedings, continue, and all the provisions of the Bankruptcy Act, 1869, shall, except as aforesaid, apply thereto, as if this Act had not passed."

(3) 53 Law J. Rep. Q.B. 165; Law Rep. 12 Q.B. D. 224.

(4) Law Rep. W.N. 1884, p. 29; Morrell's Bankruptcy Cases, part 1, p. 17.

[IN THE HOUSE OF LORDS.]

1885. March 24, 26. THE METROPOLITAN BANK (LIMITED) AND ARTHUR COOPER (THE LIQUIDATOR THEREOF) *v.* POOLEY.

Practice—Dismissing Action as frivolous and vexatious—Order XXV. rule 4—*Action by Bankrupt for maliciously procuring Adjudication—Maintenance—Corporation in Liquidation.*

No action can be brought by a bankrupt for maliciously procuring his adjudication so long as the adjudication itself has not been set aside.

Whitworth *v.* Hall (2 B. & Ad. 695) *followed.*

Such an action may be dismissed as frivolous and vexatious on summons under Order XXV. rule 4.

A bankrupt cannot recover in an action for maintenance committed in relation to the proceedings for procuring his adjudication—since the cause of action must have arisen, if at all, before the bankruptcy, and the right to sue must therefore have passed to the trustee.

Per EARL OF SELBORNE, L.C.—*A corporation in liquidation, as distinct from the liquidator thereof, is incapable of maintenance.*

Order XXV. rule 4 *enables the Court to deal in an easy and summary manner with demurrable actions, and also affirms the inherent power of the Court to protect itself from the abuse of its procedure by the bringing of frivolous and vexatious actions.*

This was an appeal from an order of the Court of Appeal reversing one of a Divisional Court (Stephen, J., and Williams, J.)

The action was commenced by the respondent on the 7th of December, 1883, against the Metropolitan Bank and Sidney Toppin for damages for fraud and conspiracy and maintenance.

By his statement of claim the plaintiff alleged as follows:—

1. The plaintiff has suffered damage by the wrongful acts of the defendants in fraudulently and without reasonable cause procuring the plaintiff to be adjudicated bankrupt.

2. The adjudication took place upon a petition presented by the defendant Toppin; and after the commencement of the bankruptcy proceedings, and before such adjudication, the defendants the Metropolitan Bank gave to the defendant Sidney Toppin an indemnity against all costs and expenses which he might incur in consequence of such bankruptcy proceedings; and at the time of such adjudication the defendants, and in particular the defendants the Metropolitan Bank, had no common interest in the bankruptcy proceedings, or in the debt upon which such proceedings were founded.

3. The plaintiff before the adjudication tendered to the defendant Toppin the whole of the debt claimed by him against the plaintiff in the bankruptcy proceedings, together with a sufficient sum to cover the costs of such proceedings; but the defendants the Metropolitan Bank declined and intervened and would not allow the acceptance thereof, and the plaintiff was adjudicated bankrupt upon the petition of Toppin.

4. The matters hereinbefore complained of were done in order to enable the defendants the Metropolitan Bank to possess themselves of the plaintiff's property, or the greater part thereof, which they have wrongfully and fraudulently done.

5. The plaintiff, by reason of the before-mentioned acts of the defendants, claims damages for the maintenance of such bankruptcy proceedings and otherwise as aforesaid.

The plaintiff claims 30,000*l.*

The bank, in March, 1884, applied by summons under Order XXV. rule 4 to have the action dismissed as frivolous and vexatious and harassing, or to stay the proceedings till the costs in an action of *Pooley* v. *The Royal Exchange Bank and Others* had been paid.

The following facts were proved by affidavit:—

In March, 1879, the Metropolitan Bank was ordered to be wound up, and the appellant Cooper was appointed official liquidator.

In October, 1879, the respondent Pooley was adjudicated bankrupt on a debtor's summons issued by Sidney Toppin; in November, 1879, an appeal by

Pooley against the adjudication was dismissed, no one appearing for him.

On the 16th of July, 1880, he made an application to annul the bankruptcy, which was refused, and he did not appeal. On the 28th of July, 1880, an action was brought by Pooley against the Royal Exchange Bank, the appellant Cooper, and others, for damages for (*inter alia*) maliciously causing the filing of a bankruptcy petition against the plaintiff, and maintaining the same by fraud and concealment, and for the wilful, corrupt, and malicious prosecution of the plaintiff without reasonable or probable cause. In May, 1881, judgment of nonsuit, with costs, was entered in the last-mentioned action. No part of such costs had been paid. In August, 1881, Pooley summoned the appellant Cooper and others in the Bow Street Police Court for wrongfully and unlawfully inciting Toppin and other persons to file the bankruptcy petition and prefer claims against Pooley, and for maintaining the said persons in their proceedings, and for conspiring to oppress and injure Pooley. The summons was heard on the 14th of September, 1881, and dismissed, with costs to each defendant.

The present summons was referred by the Master to the Judge in chambers, Mathew, J., by whom it was dismissed.

The Divisional Court ordered the proceedings to be stayed until the costs in the action of *Pooley* v. *The Royal Exchange Bank and Others* were paid, on the ground that the two actions were in substance between the same parties in respect of the same cause of action. The Court of Appeal held that the parties were not substantially the same, and dismissed the summons.

Webster, Q.C., and *A. T. Lawrence*, for the appellants.—The action ought to be stayed absolutely as frivolous and vexatious. In the first place, the respondent, being an undischarged bankrupt, would not be entitled to any damages which might be recovered. Secondly, no action will lie for maliciously procuring an adjudication so long as the adjudication itself has not been set aside. Here the respondent has applied to annul the bankruptcy; but his application was dismissed, with costs. *Whitworth* v. *Hall* (1) is a direct authority on this point; and *Johnson* v. *Emerson* (2) shews that the case is analogous to that of an action for malicious prosecution. The action is also frivolous as being substantially between the same parties and in respect of the same cause as the former action against Cooper, which was decided on the merits, it being held that there was no fraud—*Hoare* v. *Dickson* (3), *Dawkins* v. *Prince Edward of Saxe Weimar* (4), *Cobbett* v. *Warner* (5), and *Castro* v. *Murray* (6).

If the above are not sufficient grounds for dismissing the action absolutely, it ought to be stayed till the costs in the former action are paid.

Gazdar (*W. Shallcross Goddard*, with him), for the respondent, was asked by the Lord Chancellor how he distinguished the case from *Whitworth* v. *Hall* (1).

The principal ground of the action is maintenance—*Bradlaugh* v. *Newdegate* (7).

[The Lord Chancellor.—If so, the right of action existed before the bankruptcy and passed to the trustee. How then can the respondent sue?]

Whitworth v. *Hall* (1) may furnish a good defence at the hearing, but the action ought not to be stayed as frivolous.

The Lord Chancellor (Earl of Selborne) (on March 26).—In the view which I take of this case, it is not necessary to determine whether the opinion of the Court of Appeal, that the two actions brought by the respondent were not substantially between the same parties, was right or not.

The Judges in the Court of Appeal do not seem to have addressed themselves (and I think your Lordships may presume that the course of the argument did not really direct them) to the other

(1) 2 B. & Ad. 695.
(2) 40 Law J. Rep. Exch. 201; Law Rep. 6 Exch. 329.
(3) 7 Com. B. Rep. 164; 18 Law J. Rep. C.P. 158.
(4) 46 Law J. Rep. Q.B. 567; Law Rep. 1 Q.B. D. 499.
(5) 8 B. & S. 21; 36 Law J. Rep. Q.B. 94; Law Rep. 2 Q.B. 108.
(6) 44 Law J. Rep. M.C. 70; Law Rep. 10 Exch. 213.
(7) 52 Law J. Rep. Q.B. 454; Law Rep. 11 Q.B. D. 1.

question, whether the action should be dismissed altogether as frivolous and vexatious.

According to the present rules of practice applicable to appeals to the Court of Appeal, it is the duty of that Court upon an appeal to make the order which ought to have been made by the Court below; and if it would have been right for the Court of Appeal, differing from the Divisional Court so far as related to the order which that Court had made, to go further and to dismiss the action altogether as frivolous and vexatious, your Lordships upon this appeal ought now to make the order which the Court of Appeal ought to have made. In my opinion the order which the Court of Appeal ought to have made was to dismiss the action altogether as frivolous and vexatious. Upon that point I entertain a very clear opinion.

Before the rules were made under the Judicature Act, the practice had been established to stay a manifestly vexatious suit which was plainly an abuse of the authority of the Court, although so far as I know there was not at that time either any statute or rule expressly authorising the Court to do it. The power seemed to be inherent in the jurisdiction of every Court of justice to protect itself from the abuse of its own procedure. Another reason why that should have been very rarely done before the recent rules is this, that if the objection was one which could be raised upon the face of the pleadings, that always might be done by demurrer. But when the Rules of 1883 were settled and came in force, which they did before the present action was brought, it was thought that the formal and technical practice of demurrer might with advantage be abolished, and that more easy and summary, or at least equally summary, modes of applying to the Court to get rid of an action on the face of it manifestly groundless might be substituted. And by the 4th rule of Order XXV. of 1883, this is provided: "The Court or a Judge may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer; and in any such case, or in case of the action or defence being shewn on the pleadings to be frivolous or vexatious, the Court or a Judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just."

Under that rule it is manifest that the Court might have ordered this action to be dismissed on the same grounds as those on which a demurrer might formerly have been allowed, or if it appeared that the action was frivolous or vexatious. In this case the form of the application to the Court was that the action should be dismissed as frivolous and vexatious, and not on the ground that the pleading did not disclose any reasonable cause of action. Nevertheless, it is an element of primary importance, in determining the question whether an action is frivolous and vexatious, to consider what sort of cause of action, if any, appears upon the face of the pleading. The plaintiff, Mr. Pooley, who instituted this action on the 7th of December, 1883, is a bankrupt, and was a bankrupt for a considerable time before. In the view which I take of the case it is not material—but it is, I believe, the fact—that he is an undischarged bankrupt. But even if he had been discharged without having got rid of and annulled the bankruptcy as wrong *ab initio*, my impression is that it would have made no difference in this case. The facts with regard to his bankruptcy appear to be these, and there is no dispute whatever about them. He was adjudicated bankrupt on the 22nd of October, 1879, on the petition of a Mr. Toppin, who is one of the defendants to this action, but not an appellant to your Lordships. That was rather more than four years before the commencement of the present action. The plaintiff appealed against the adjudication, and that appeal, on the 13th of November in the same year, 1879, was dismissed with costs, the plaintiff not appearing. But the matter did not stop there. It appears from an exhibit to an affidavit put in by Mr. Pooley himself, that on the 18th of February, 1880, he examined or cross-examined in bankruptcy Mr. Cooper, the official liquidator of the Metropolitan Bank, and that the conspiracy to procure his ruin (that is what he alleges in the present action) was fully disclosed by that examination. Whether he had before that time actually made his application to

annul the bankruptcy is not clear. I think it very probable that he may have done so; but, whether it was before or after, he did make such an application, and he did not then make a default in appearance. Upon the 16th of July, 1880, that application was heard and determined; it was dismissed with costs, and he never appealed from that dismissal. So that three and a half years before the present action was brought he was plainly in possession of all the materials on which his present complaint is founded; he used those materials, as it was right and proper that he should do if there was anything in them, to get rid of the bankruptcy; he went to the proper Court for that purpose, and the adjudication in bankruptcy was finally and conclusively affirmed.

Under those circumstances it is perfectly clear and certain that Mr. Pooley, as a bankrupt, and as a bankrupt irreversibly found to be so, has no *locus standi* to come into Court and to say, what he does say by his statement of claim, that he "has suffered damage by the wrongful acts of the defendants in fraudulently and without reasonable cause procuring him to be adjudicated bankrupt," or to say, as he does in his writ, which is explained by that statement of claim, that he seeks "damages for fraud and conspiracy." I reserve for separate observation the other point which is insisted upon, namely, "maintenance." It was settled as long ago as the case of *Whitworth* v. *Hall* (1), which was referred to in the argument, that in an action for maliciously and without reasonable cause suing out a commission of bankruptcy, it must be averred and proved that the commission was superseded before the action was brought, and that for a reason which applies to other analogous cases. An action for malicious prosecution cannot be maintained until the result of the prosecution has shewn that there was no ground for it. If a man has been tried and convicted on that prosecution, and there is no writ of error brought and no reversal of the decision, such an action will not lie: and it is manifestly a matter of high public policy that it should be so; otherwise the most solemn proceedings of all our Courts of justice, civil and criminal, when they have come to a final determination settling the rights and liabilities of the parties, might be made themselves the subject of an independent controversy, and their propriety might be challenged by actions of this kind. It is therefore clear (and the learned counsel for the respondent found a difficulty in denying it in the course of his argument) that on that ground—namely, causing the plaintiff to be fraudulently and without reasonable cause adjudicated a bankrupt—there can be no pretence for the action. It is manifestly groundless, and, even without the other facts, I should have been disposed to say manifestly frivolous. The adjudication stands; and, even if he had never litigated or disputed it, the fact of its standing would be a sufficient answer to this alleged cause of action. But when you find from the affidavits filed in the cause that he had litigated it with full knowledge of those facts, which if true, and if his view of them were correct, would be a sufficient reason for setting it aside, and that it was solemnly confirmed, and that this occurred two or three years before the action was brought, I am bound to say that I can conceive nothing more frivolous, I can conceive nothing more vexatious, than an action brought on that ground.

And that is really the sole substantial ground for the action; because, although he adds the word "maintenance" in the indorsement upon the writ, and states in the second paragraph of his statement of claim that the appellants the Metropolitan Bank gave to Toppin, the petitioning creditor, an indemnity against his costs in the bankruptcy proceedings, and alleges that at that time the bank had no common interest in the bankruptcy proceedings, or in the debt due to Toppin; and although in the fifth paragraph, founding himself on these allegations, he says that, "by reason of those acts of the defendant, he claims damages for the maintenance of such bankruptcy proceedings, and otherwise as aforesaid": yet, in reality, I think it is quite plain that if the first ground fails, the second ground must fail also. It was said by the respondent's counsel that in a recent case, to which he referred, of *Bradlaugh* v. *Newdigate* (7), it had been determined that an

action would lie for maintenance by one man of an action in the name of another who would not otherwise have brought the action, but who was induced to bring it by the solicitation and offer of indemnity of the person charged with maintenance. That may be true; but, as applied to the present case, there seem to me to be two considerations which dispose of this allegation of maintenance, shewing that it can be no real or substantial ground for maintaining this present action. The first is this: maintenance, in the sense which the argument assumes, is not merely under some circumstances a civil wrong entitling the person injured to damages, but is a wrong founded upon a prohibition by statute which makes it a criminal act and a misdemeanour; and I apprehend it to be clear that the civil action for maintenance would not lie except against a person who was guilty of the criminal act. As with respect to the adjudication in bankruptcy, so with respect to this alleged maintenance, the present plaintiff has previously tried the matter, and in a more proper form; because on the 24th of August, 1881, as appears by the affidavits, he made a criminal charge for maintenance against Mr. Cooper, the official liquidator—who could alone be the agent in such a thing, if it were done—and that charge was dismissed with costs. He charged Arthur Cooper and Francis Cooper, his partner in business—Arthur being the liquidator—with this offence of maintenance, and the magistrate considered the case to be completely answered, and, as I say, dismissed the charge with costs. I will not cite what was said by the counsel, because it has nothing to do with the matter, though it very much expresses the sentiments which I think this proceeding is calculated to excite in your Lordships' minds. So that in proper form the application was made, and the criminal charge for maintenance could not be pressed further.

In my opinion the corporation, the Metropolitan Bank, was incapable of maintenance. Maintenance in that sense could not take place by a corporation in liquidation. A corporation in liquidation might be answerable under certain circumstances for the improper acts of its liquidator, its agent. If it had profited by those acts it would not be permitted to retain the profit—it would be chargeable no doubt in that respect, I suppose, even if in liquidation. But this particular act of maintenance, which is criminal, and also in some circumstances the ground of a civil action, is an act which, in my opinion, the Metropolitan Bank in liquidation, the corporation as distinct from the individual liquidator, was incapable of committing. That is one reason. It may also be a question whether if this act, which upon the shewing of the plaintiff preceded the proceedings in bankruptcy, was an act amounting to a civil wrong against him, affecting him in respect not of his person but of his property, and in respect of which he had a right of action, and was entitled to recover damages, and if that right of action was against the Metropolitan Bank, that, as well as all other similar rights of action which he was entitled to at the time of the adjudication, did not pass to the trustee in bankruptcy. So that, if any real damage had been sustained by him in respect of his property, and if there really was this right of action, he, as a bankrupt, would have no interest, after the adjudication, in that right of action. Therefore there is no right of action at all in him, and the whole thing is a bankrupt's action for matters in respect of which the bankrupt, not having got rid of or annulled his bankruptcy, could not sue.

I think that what I have already said would have brought me, if there were nothing to be added to it, to the conclusion that this was not only a groundless statement of claim, but was also frivolous and vexatious. But to that is to be added the fact that the plaintiff brought another and a similar action in respect of the same matters (I do not know that maintenance was thought of at that time, but putting maintenance aside the whole substance of the complaint was the same) against other parties, including the liquidator, I think in his personal capacity, on the 28th of July, 1880; and beyond all doubt the liquidator, if a wrong had been committed, would have been personally liable for it, and the corporation in liquidation, who could not do any such

act at all otherwise than through its liquidator, if liable upon the principle which I have mentioned—namely, upon the principle that it had derived benefit from the transaction, or whatever else may be stated as the ground—could only be so upon the supposition that its liquidator had done the wrong which was alleged against him in that former action. That former action was permitted to proceed. Whether it might have been stopped or not, it is not for us now to enquire. It proceeded, and was brought to a conclusion. It was tried upon the merits; and in 1881, not quite three years before the present action was brought, it ended in a nonsuit upon the merits, the whole case entirely failing and being adjudged against the bankrupt; and I am sorry to say that it appears that that proceeding of the undischarged bankrupt cost to the various parties 3,000*l.*, of which 1,800*l.* was incurred by Mr. Arthur Cooper, the liquidator of this corporation. It would be a scandal and disgrace to the administration of justice in this country if such proceeding were permitted to be repeated, whether with some colourable variation of the *dramatis personæ* or not. Anything more vexatious than to allow, after that, a groundless action, upon such a statement of claim as this, by a bankrupt to go on, at the risk of incurring 3,000*l.* more costs, I cannot conceive.

I therefore advise your Lordships that the appeal should be allowed, and that the order should be made which I think ought to have been made by the Court of Appeal, that the action be absolutely stayed as frivolous and vexatious.

I do not know that there is much use in giving costs against a bankrupt. Whether he can pay them or not I do not know, but I do not think that it is a case in which he can object that injustice is done to him if he is ordered to pay those costs, however little chance there may be of the appellants getting any of them from him.

Lord Blackburn.—I quite agree in the result to which the Lord Chancellor has come, that the order of this House ought to be to stay this action altogether, and (however little good may come of it) to order the respondent to pay the costs of the appeal.

At common law originally the judgment of the Court was always obtained either by a demurrer or any other proceeding which, upon the record, gave a judgment, or an issue was taken of fact and a verdict was found, and then a judgment was given upon the record. But from early times (I rather think, though I have not looked at it enough to say, from the earliest times) the Court had inherently in its power the right to see that its process was not abused by a proceeding without reasonable grounds, so as to be vexatious and harassing—the Court had the right to protect itself against such an abuse; but that was not done upon demurrer, or upon the record, or upon the verdict of a jury, or evidence taken in that way: but it was done by the Court informing its conscience upon affidavits, and by a summary order to stay the action which was brought under such circumstances as to be an abuse of the process of the Court—and in a proper case they did stay the action.

In the present case we are not any longer at common law. The Judicature Act has been introduced, and rules have been made under the Judicature Act. I agree in what the Lord Chancellor has said, that Order XXV. rule 4, of 1883, which he has read, and which I will not read over again, considerably extends the power of the Court to act in such a manner as I have stated, and enables it to stay an action on further grounds than those on which it could have been stayed at common law. The proceeding which is thus given, however, does require the Court to be satisfied that the action is frivolous or vexatious (I think that those are the words which are used in the rule), and then the action may be dismissed, or it may be stayed by the Court in a summary manner without raising the question upon a demurrer or by an issue of fact. It is obvious to my mind that, as regards both that which was done under the common law jurisdiction of the Court, and that which may be done under the more extensive jurisdiction now given to the Courts, although it should not be lightly done, yet it may often be re-

quired by the very essence of justice to be done.

The summons taken out was "that this action be dismissed as frivolous, vexatious, and harassing, or," in the alternative, "that all proceedings herein be stayed until the costs in the action of *Pooley* v. *The Royal Exchange Bank and others* are paid."

The Divisional Court not having, I think, perceived, in consequence of not having had their attention called to it, that the new rule which had come into operation in 1883 had extended their jurisdiction, thought that this was a case in which they had jurisdiction at common law, and if the case was properly made out upon affidavit they had jurisdiction. They also thought (I do not know whether they can be said to have decided) that whether the action was frivolous and vexatious or not, it was a strong and serious thing (and undoubtedly it was) for the Court summarily, in the exercise of their common law jurisdiction, against which there would originally have been no appeal, to stay the action altogether, and they thought that justice would be fully done if the order were that it should be stayed until the costs of the former action were paid. That was a thing which had been often done, assuming that it was a proper case for staying the action till the costs of the former action were paid. It would be a right thing to do that if it was a proper case. Whether it was the proper course to take in this case, whether the former action is shewn to be so much the same action, being against parties in the same interest as in the present one, that it would be a right thing to stay the action, it would require a minute examination of affidavits to say. But it is quite unnecessary to examine that, as we have a more extensive jurisdiction now given to the Courts, and this is, in my opinion, a very proper case for exercising that jurisdiction by staying the action altogether.

What is this action brought for? The statement of claim is that "the plaintiff has suffered damage by the wrongful acts of the defendants in fraudulently and without reasonable cause procuring the plaintiff to be adjudicated bankrupt." Then, after some things which merely go to shew why it was maliciously and without reasonable or probable cause procuring him to be adjudicated bankrupt, he goes on to add, "The plaintiff, by reason of the beforementioned acts of the defendants, claims damages for the maintenance of such bankruptcy proceedings." What he means by that I am sure I do not know. I do not enter into the question of what are the grounds on which an action may be maintained for maintenance. I do not enquire further into that at all; but I simply say that here, upon the face of this claim, there are two things clear. If, according to the decisions which have been come to, a proceeding for suing out maliciously and without probable cause a commission in bankruptcy cannot be maintained so long as the commission in bankruptcy stands unreversed; if that be so as long as the commission in bankruptcy stands, the first ground of claim—namely, "in fraudulently and without reasonable cause procuring the plaintiff to be adjudicated bankrupt"—is clearly not a matter for which an action would lie, unless he shews, what on the face of the claim he does not shew, that the commission or adjudication in bankruptcy had been got rid of. As regards the second ground, assuming for the moment that it means something which was an injury to his estate for which an action could be maintained to recover damages, as long as the commission in bankruptcy remains, and his creditors are therefore entitled to take those damages, that would be a thing which the assignees would recover for the benefit of the creditors, and not of the bankrupt himself. On both those grounds, on the face of this claim, it appears that there is no cause of action.

I do not think that it would necessarily follow that it was to be considered frivolous and vexatious merely because there had been a previous decision unreversed and unappealed against. For, I think I may say, the last thirty or forty years it has been considered good law that an action could not be maintained until the commission in bankruptcy had been got rid of. I can easily suppose that it might be the case that though that has long been considered to be law, yet the bankrupt being held to be acting frivolously and

vexatiously, might seek to raise the question and bring it to the House of Lords and have that decision reversed. That is possible enough, and therefore I do not think that it would necessarily be frivolous and vexatious. But under the new process which is now given, the Court are entitled, if the action is frivolous and vexatious, to stay it, and for that purpose you are to bring in affidavits. And on the affidavits in the present case it appears distinctly that the not saying that the adjudication in bankruptcy had not been got rid of was no mere slip, but that the plaintiff himself had tried to have it set aside, and had had his application refused with costs; that he had tried to prosecute persons before a magistrate for what he imagined to be maintenance, but had been refused with costs; that he brought an action for a supposed conspiracy against half a dozen persons, and the result of that action was that he was defeated and nonsuited, and had 1,800*l.* to pay as taxed costs, which they could not get paid—that the plaintiff, with all these matters before him, has brought this action without paying a farthing of those costs. If that is not frivolous and vexatious and annoying, I find great difficulty in seeing what can be frivolous and vexatious and annoying.

[After commenting on the affidavits, his Lordship proceeded:] If it had been on demurrer, it might have been said that there was some slip in not making the allegation; but now that it is upon the affidavits, can it be reasonably contended that this action is (I am giving the words of the rule from memory) not frivolous and vexatious? Frivolous I have pointed out that it is, in the sense that unless all the decisions which have been come to hitherto have been wrong (which of course is possible) he has no ground of action. Vexatious it is, if anything whatsoever can be vexatious. And why, therefore, this action should not be stayed absolutely I do not know.

The Court of Appeal thought that they were treating the matter at common law, and they thought that they were confined solely to the alternative on which the Divisional Court had gone. I do not enquire whether upon that assumption they were right or not. It would require a minute examination of the affidavits to decide whether they were right or not. But I do say that if their attention had been called to the extended jurisdiction which had come into force at that time, they could hardly have avoided seeing that this was a case in which the action ought to be stayed altogether.

LORD WATSON.—I am of the same opinion. We are bound to assume that the proceedings for having the respondent adjudicated a bankrupt were taken with reasonable and probable cause, and that no ground exists for annulling the adjudication.

In these circumstances the respondent cannot maintain his claim for damages against the appellants upon the mere allegation that these proceedings were taken fraudulently or maliciously. If a claim for damages would lie against the appellants for maintenance committed in the course of these bankruptcy proceedings, as to which I entertain some doubt, the right of action for such damage was vested in the respondent's assignees.

I shall not advert to the other features of this case which have been already noticed by your Lordships. I can hardly conceive of an action which could be more justly described as frivolous and vexatious than the present. I think that this is a very proper case for the application of the new rule, and I concur in the judgment proposed.

LORD FITZGERALD.—I do not intend to advert to the facts of the case, save to express my entire concurrence in this, that the action now before us is beyond question a vexatious and a harassing action, and one which is frivolous in this sense, that upon the face of the pleadings it is manifest that the action never can be maintained. I apprehend that under such circumstances, in applying the new rule which has been adverted to, the only course to pursue is to stay the action altogether.

I should not say another word but that I was surprised in the course of the argument to find that any doubt could be thrown on the proposition that in an action such as this it was necessary to shew that the adjudication had been annulled. I had

a very early recollection of the authorities proceeding in one uniform course and not leaving it open to entertain any doubt upon that proposition.

The action here is for "fraudulently and without reasonable cause procuring the plaintiff to be adjudicated bankrupt." That is the real action before us. The fourth paragraph (after two intermediate ones) is this: "The matters hereinbefore complained of"—that is, the procuring this adjudication to be made fraudulently and without reasonable cause—"were done in order to enable the defendants the Metropolitan Bank to possess themselves of the plaintiff's property or the greater part thereof, which they have wrongfully and fraudulently done;" and he claims 30,000*l.* for that. Then the adjudication subsists and remains in full force. It is said that it was procured with the view to get possession of property, and it is for injury to property alone that this action is brought; whereas, upon the face of it, it is manifest that if the action were otherwise well founded, the interest in that property would not be in the plaintiff, but in the assignees in bankruptcy.

But what I wish first to advert to is the case of *Whitworth* v. *Hall* (1), and the doubt which was thrown at the bar, if any doubt could be thrown, on the law there laid down. The reference to that case emanated from the Lord Chancellor, and did not come originally from the bar. It is remarkable that the question upon that case and the question upon the rule was not raised at all either before Mr. Justice Mathew, or in the Divisional Court, or in the Court of Appeal. I thought it well to look into the precedents as they stand—for, after all, upon a question of this kind precedent is everything; and, having a vivid recollection of the old rules of pleading, I went at once to *Wentworth on Pleading*—a book which, although now forgotten, was regarded in its time as of considerable authority, and as giving none but precedents which had stood the test of actual practice; and your Lordships will find in the 8th volume of *Wentworth's Precedents*, pages 313-15, the form of declaration in an action of this kind. The expression there used was "maliciously suing out a commission of bankruptcy;" but it is more properly expressed in modern practice to be "maliciously procuring the party to be adjudicated a bankrupt." At that time the bankrupt—or the person against whom a commission had been sued out—not surrendering, became a felon, and was liable to be treated accordingly; and Wentworth says (I mention that as expressly averred) that the plaintiff averred that at the peril of his life he had surrendered to that commission, and then he adds (this is the averment), "and the plaintiff saith that the said commission afterwards," on such and such a day, "was duly superseded." The commission therefore was at an end; it was superseded and gone, and the plaintiff had a right then to bring an action for a malicious abuse of that procedure.

The precedents up to 1831 will be found to be uniform—although in an early edition of *Chitty on Pleading* there is a recommendation to add a count omitting the averment in question; but no serious doubt existed. Before the decision in *Whitworth* v. *Hall* (1), the point now before us arose in Ireland in the case of *Crean* v. *Hodgens* (8), and was very well argued. The action was for maliciously suing out a commission of bankruptcy, and contained an averment "that the said commission was afterwards duly superseded," following the established precedent and putting in an averment which required to be proved, and proved by a writ of *supersedeas*. The plea was that the action had been commenced by suing out a writ of common law subpœna, and that at the time of issuing that writ the commission was in full force and had not been superseded. To that plea there was a demurrer. The Court held the plea bad on special grounds, and added that the proper course for the defendant would have been to have pleaded traversing the *supersedeas* before the filing of the declaration; but the Court held the averment to be material and necessary for the maintenance of the action.

After that decision, but before it was printed, the decision in the case of *Whitworth* v. *Hall* (1), which has been adverted to, was published, and the learned editor of *Hayes's Reports* mentions with

(8) Hayes, 184.

approval in a note the decision of that case. *Whitworth* v. *Hall* (1) will be found cited also in *Atkinson* v. *Raleigh* (9), and certainly with no mark of disapproval. It was an action for maliciously suing out a fiat of bankruptcy, there being an averment that the Court of review afterwards annulled the fiat. The plea was, not guilty. It appeared on the trial that the fiat had been annulled by the Lord Chancellor and not by the Court of review; so that there was what, according to the then practice, would have been a fatal variance. But after a verdict for the plaintiff, the defendant moved to enter a nonsuit upon the ground that there had been no annulment of the fiat, inasmuch as it had been made by the Lord Chancellor in place of having been made by the Court of review. It was, however, held that the plea of not guilty did not put in issue the due annulling of the fiat: and therefore the plaintiff obtained his judgment.

But the law upon this subject has been properly and scientifically put in a later case—*Munce* v. *Black* (10)—shewing exactly how the law stands, and the ground upon which it ought to rest. That was an action on the case for maliciously by means of a false affidavit causing an injunction to be issued out of the Incumbered Estates Court, under which the plaintiff was turned out of possession of his estate. There was a demurrer to the declaration, because it did not shew the termination of the process of injunction in the Incumbered Estates Court. In fact it not only did not shew the termination of it, but shewed that it was in full force. Upon that demurrer the Court gave judgment for the defendant; and Chief Baron Pigot puts the reason thus—and it is the ground upon which it ought to rest and stand—"In an action for the malicious prosecution of proceedings, where the particular proceeding is the immediate result of the adjudication of a Court of competent jurisdiction, the pleading is bad unless it shews that the proceeding is at an end;" and he adds at the conclusion of his judgment, "the case is one *primæ impressionis* to make a process, still remaining in full force and effect, the subject of a suit for maliciously putting in force the order of the Court. The case has not terminated. A proceeding emanating from that order of the Court, remaining unreversed, cannot be the subject of an action." So here, it appearing that this adjudication is still in full force, and the plaintiff complaining that by reason (that is the foundation of the action) of that adjudication his property had been taken possession of by the assignee, and he is deprived of it, I say, in the words of Chief Baron Pigot, that as long as that adjudication remains in full force and effect, no action can be maintained at law for the proceedings under that adjudication.

Upon these two grounds I am perfectly clear that this action is not sustainable, that upon the face of it it cannot be sustained, and that there is no doubt whatever upon the law, and I am equally clear that it is harassing and vexatious.

Order appealed from reversed; declaration that the order of the Divisional Court ought to have been discharged, and an order made to dismiss the action against the Metropolitan Bank, with costs, as frivolous and vexatious; action ordered to stand dismissed with costs accordingly; each party to pay his or their own costs in the Court of Appeal, the respondent to pay the costs of the appeal to this House; cause remitted to the Queen's Bench Division.

Solicitors—Newman, Stretton & Hilliard, for appellants; Randolph Chamberlain, for respondent.

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(9) 3 Q.B. Rep. 79; 11 Law J. Rep. Q.B. 165
(10) 7 Ir. C. L. R. 475.

1884. Dec. 11, 12. THE QUEEN (*on the prosecution of* THE ACTON LOCAL BOARD) *v.* ESSEX.

Lands Clauses Consolidation Act, 1845 (8 *Vict. c.* 18), *s.* 63—*Compensation—Owner of Land taken and of Land not taken—Depreciation of latter by use to be made of former.*

Part of a building estate was taken under a special Act incorporating the Lands Clauses Consolidation Act, 1845, *for the purpose of a sewage farm. The remainder of the estate was thereby seriously depreciated in market value. In assessing compensation to the owner of the estate a jury awarded him, together with a sum for the value of the land taken, a sum corresponding to that depreciation*:—Held, *that there was no excess of jurisdiction in their so doing.*

This was a rule *nisi* for a writ of *certiorari* to bring up (for the purpose of quashing it), on the ground of excess of jurisdiction, an inquisition before the sheriff of Middlesex, touching a claim to compensation for the purchase by the local board of the interest of the claimant (Essex) in certain lands and the injuriously affecting, by the exercise of the statutory powers of the board, of other lands of which he was the owner. The material facts before the Court on the argument of the rule were as follows:—

By a provisional order of the Local Government Board dated the 9th of May, 1881, confirmed by "the Local Government Board's Provisional Orders Confirmation (Acton, &c.) Act, 1881," the Acton Local Board were empowered to put in force, as to the lands described in the schedule thereto, the powers of the Lands Clauses Consolidation Acts, 1845, 1860, and 1869, with respect to the purchase and taking of lands otherwise than by agreement, for the purpose of providing for the sewerage, and the disposal and utilisation of the sewage of their district, and the necessary works connected therewith. The fee-simple of the land required by the board belonged to Essex, and the land had been let on building agreements for ninty-nine years from the 25th of March, 1878, to two several lessees named Scott and Serff. In pursuance of the provisional order the local board gave to Essex on the 22nd of May, 1883, notice to treat for the purchase of this land, amounting to 5a. 1r. 35p.; a warrant of the local board was, on the 23rd of February, 1884, lodged with the sheriff for the summoning of a jury to enquire into the compensation to be paid to Essex; and an inquisition, pursuant to the warrant, was held on the 2nd and 21st of July, 1884. On the holding of the inquisition a claim was made on behalf of Essex to compensation for alleged injury to certain land of which he was the owner, other than the land taken, by reason of the fact that the land required by the local board was required for sewage works. It was admitted on the part of the claimant that the land taken was physically separated from the land alleged to be damaged, part being separated by a railway from the land taken, and the other part being, though near the land taken, not immediately contiguous to it; but evidence was adduced on his behalf that these lands, which were all intended to be used as building land, were seriously depreciated in marketable value by the fact that the land taken was required for the purpose of dealing with sewage, and it was contended that, although no nuisance might arise, he was entitled to be compensated for the depreciation. The jury awarded, in addition to 8,737*l.* for the purchase of the fee-simple of the land taken, 4,000*l.* for damage sustained or to be sustained by reason of the injuriously affecting the other lands of the claimant by the exercise by the local board of the powers of the Acts mentioned in the warrant. This rule was obtained on the ground that the award was in that respect in excess of jurisdiction.

Edward Clarke, Q.C., and *C. H. Anderson*, for the claimant.—The question is, whether an owner of lands taken for the purpose of executing sewage works thereon can, under the Lands Clauses Consolidation Act, recover compensation for the damage thereby sustained by him as owner of other lands. We contend that he can. An owner of lands taken for the purpose of executing works thereon is in a better position than another person as to damage caused by those works and the use of them

in respect of lands not taken—*In re The Stockport, Timperley, and Altrincham Railway Company* (1). Crompton, J., there, in answer to the argument that compensation can only be claimed where apart from statutory justification there would have been a right of action, pointed out that where mischief is caused by what is done on the claimant's own land taken from him under the special Act, he can say, "without the Act of Parliament everything you have done and are about to do in making and using the" works "would have been illegal and actionable, and is therefore matter for compensation according to the rule in question." That case shews also that the depreciation in marketable value of the lands not taken was in itself matter for compensation, even although it might be founded merely on a groundless fear that smells and contamination of the air would arise; for there the landowner was held entitled to compensation from the railway company for the injury caused to him by the mere refusal of insurance companies to insure his property, a cotton mill, save at a very high premium, by reason of supposed risk of fire from trains passing over the railway. In *Brand* v. *The Hammersmith Railway Company* (2) no land of the claimant had been taken. In *The Glasgow Union Railway Company* v. *Hunter* (3) the claim in question was for damage occurring by the use of a railway bridge not built upon land taken from the claimant. In *The Duke of Buccleuch* v. *The Metropolitan Board of Works* (4) Lord Chelmsford appears to have said that both in *Brand* v. *The Hammersmith Railway Company* (2) and *The Glasgow Union Railway Company* v. *Hunter* (3) no land taken by the railway company was connected with the lands alleged to have been injured, and the claim for compensation was for damage caused by the use and not by the construction of the railway, and to have thought that if the facts had been different on the first point, compensation might in each of those cases have been successfully claimed on account of probable depreciation by reason of vibration, smoke, or noise from passing trains. They referred also to *The Queen* v. *Sheward* (5), *Walker's Trustees* v. *The Caledonian Railway Company* (6), *Oswald* v. *The Ayr Harbour Commissioners* (7), and *Holt* v. *The Gas Light and Coke Company* (8).

R. E. Webster, Q.C., and *Pollard*, supported the rule.—*In re The Stockport, Timperley, and Altrincham Railway Company* (1) is no longer law. *The Glasgow Union Railway Company* v. *Hunter* (3) is a conclusive authority against the claimant in this case. It shews that, even where land of the claimant has been taken, no claim can be made to compensation save in respect of damage for which the claimant would in the absence of the special Act have had an action; and further, that the damage must have been done by the construction of the works and not afterwards by the use of the works. In so laying down the law, it only repeats and applies on the first of those two heads the law long before laid down in *The Caledonian Railway Company* v. *Ogilvy* (9) and *Penny* v. *The South-Eastern Railway Company* (10), and accepted by Lord Cairns in *The Metropolitan Board of Works* v. *McCarthy* (11), and on the second head the law laid down in *Brand* v. *The Hammersmith Railway Company* (2). In *The Duke of Buccleuch* v. *The Metropolitan Board of Works* (4) the compensation given which was in question was really the value of land of the claimant which had been taken; for "land" under the Thames Embankment Act, 1862 (26 & 27 Vict. c. 93), section 4, included "easements, interests, rights, and privileges in, over, or affecting lands"; and in *Lyon* v. *The Fishmongers' Company* (12) Lord Cairns pointed out that direct

(1) 33 Law J. Rep. Q.B. 251.
(2) 38 Law J. Rep. Q.B. 265; Law Rep. 4 H.L. 171.
(3) Law Rep. 2 Sc. App. 78.
(4) 41 Law J. Rep. Exch. 137; Law Rep. 5 H.L. 418.
(5) Law Rep. 9 Q.B. D. 741.
(6) Law Rep. 7 App. Cas. 259.
(7) Law Rep. 8 App. Cas. 623.
(8) 41 Law J. Rep. Q.B. 351; Law Rep. 7 Q.B. 728.
(9) 2 Macq. 229.
(10) 7 E. & B. 660; 26 Law J. Rep. Q.B. 225.
(11) 43 Law J. Rep. C.P. 85; Law Rep. 7 H.L. 243.
(12) 46 Law J. Rep. Chanc. 68; Law Rep. 1 App. Cas. 662.

access from a house to a highway, whether a road or a navigable river, was a private right.

MATHEW, J.—I am of opinion that this rule must be discharged, and that the claimant is entitled to the sum of 4,000*l.* given him as representing the damage sustained by him by reason of the injuriously affecting by the exercise of the board's statutory powers of his lands, tenements, and hereditaments other than those taken by the board.

The point presented for our consideration is whether, if land forming part of one estate is taken for a certain purpose authorised by statute, it is or is not legitimate in assessing the damage arising from the taking of the land to take into account the purpose for which the land taken is to be used.

The circumstances of the case illustrate the contention between the parties with great nicety. The land in question here has been taken possession of under compulsory powers by this local authority for the purpose of carrying out upon it a sewage farm. The land is part of a building estate belonging to the claimant. As regards a part of the estate the land taken is physically severed from it by a railway; as regards another part of the estate the land taken is close to it but not immediately contiguous; and the evidence given before the jury, and upon which the jury acted, was that as regards these remaining portions of the estate there was a depreciation of their marketable value by the sum of 4,000*l.* There was a property which was of uniform character before any part of it was taken by the board, and which was adapted and laid out for building purposes. What the board has done is to take a part of the land, and destroy it so far as it was available for building purposes; and it is said on the part of the board that while the owner of the property is entitled to compensation for the full value of the land taken, the jury, in assessing compensation, ought not to look at the effect which the employment of the land for the purpose of a sewage farm, rather than for the purpose of a building estate, would have upon the adjoining property.

The language of section 63 of the Lands Clauses Consolidation Act, 1845, appears to me, notwithstanding the criticism to which parts of that statute have been exposed, to be clear. The section runs thus: "In estimating the purchase-money or compensation to be paid by the promoters of the undertaking in any of the cases aforesaid, regard shall be had by the Justices, arbitrators, or surveyors, as the case may be, not only to the value of the land to be purchased or taken by the promoters of the undertaking, but also to the damage, if any, to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such other lands by the exercise of the powers of this or the special Act or any Act incorporated therewith." With section 63 may be read, as throwing light upon it, section 68 and section 49.

If one had to interpret the Act for the first time, one would have deemed it perfectly clear that when property is taken to be used for such a purpose as that indicated by the Act under which these proceedings have taken place, it is necessary, if section 63 is to be acted upon, to consider what the effect upon the marketable value of the remainder of the estate will be. There are many simple instances which might be put shewing how much the value of part of an estate may be affected by another part of it being taken for a particular purpose. Suppose, for instance, land to be taken for the purpose of a cemetery, or of gasworks, or chemical works. According to Mr. Webster's contention, compensation is to be assessed in any one of those cases precisely in the same way as if the land taken was to be laid out as pleasure-grounds for the advantage of the whole neighbourhood. But, taking any of the tests which have been suggested for ascertaining the amount of compensation which can be properly claimed, can that contention be regarded as sound?

Suppose that the claimant is to be treated as a willing vendor. Can anybody doubt that a man selling this piece of land would take into account the effect which the use of the property for the purpose for which it was sold would have upon the

adjoining part of his estate? Suppose, instead, that the board take the land without statutory powers, and that the claimant brings an action against them as trespassers. Can anybody doubt that it would be a perfectly legitimate head of damage to shew that the taking of the land to use it for a particular purpose depreciated the value of the rest of the estate? Again, to take as an illustration a very simple case, if a railway is authorised which passes through a field acquired or laid out for building purposes, is the owner to be compensated merely for the value of so much of that field as is used for the railway? May he not ask the jury or the arbitrator to take into account the effect on what is left of a portion having been taken for the purpose of a railway?

The case, however, as we have good reason to know, is not without authority.

The case first cited was *The Stockport Case* (1). According to my view that case has never been overruled; it has been criticised and distinguished, but no Court (as far as I know) has ever pronounced the decision to be wrong. And, if it has not been overruled, it is a high authority in favour of the claimant in the present case.

The next case cited on behalf of the claimant was *The Duke of Buccleuch's Case* (4). That case seems to me to be a strong authority in favour of the claimant. What was there interfered with was no more than an easement, or *quasi*-easement —the right of approach to the river—but by the terms of the special Act that easement was, for the purposes of compensation, to be treated as land. If I understand the judgments rightly, the Duke of Buccleuch was held entitled to compensation for any inconvenience to which he would be put by the construction of the roadway in front of his house, because that easement, treated by the special Act as land, had been taken possession of by the Metropolitan Board of Works. The very large compensation given in that case proceeded, as I understand, entirely upon the principle laid down in *The Stockport Case* (1).

But then it is said that there is a case, which, like *The Duke of Buccleuch's Case* (4), was also decided by the House of Lords, and which qualified *The Stockport Case* (1), and must be acted upon here as an authority in favour of the local board —the case of *The City of Glasgow Union Railway Company* v. *Hunter* (3). In that case a railway company had taken certain land which belonged to the claimant and was at the back of his house, and also certain other land which did not belong to him and was in front of his house, and the use of the latter by the railway company was calculated to depreciate the value of the claimant's house. He claimed compensation in respect of that upon the authority of *The Stockport Case* (1). But it was quite answer enough that the damage caused to him was not by reason of anything done on land taken which had belonged to him, and that he therefore could no more claim compensation for it than any other of those persons in front of whose houses the railway was constructed could claim for similar damage; and accordingly it was, upon that ground, held that the claimant was not entitled to compensation. That case, however, has no application to the present, for the depreciation here is clearly referable to the use proposed to be made of the land of the claimant which has been taken by the board.

It is further said that by the cases of *The Metropolitan Board of Works* v. *McCarthy* (11), *The Hammersmith Railway Company* v. *Brand* (2), and *The Caledonian Railway Company* v. *Ogilvy* (9), it has been settled that a man cannot get compensation for damage arising to his property merely from the use for a purpose authorised by statute of neighbouring land acquired under statutory powers; and it is asked, why should compensation be given for such damage in case any part of the claimant's land is taken? None of the cases, however, which have been referred to appear to me either to deal, or to be intended to deal, with a case where land of the claimant has been taken and damage is caused to other land forming part of the same estate by the use of the land so taken.

On the principles of *The Stockport Case* (1), I think that the rule must be discharged.

DAY, J.—I concur in the conclusion at

which my brother Mathew has arrived and in his reasons.

The source of all the difficulty which has arisen in this and many similar cases has, I think, been (as has been often said) the decision arrived at long ago in *The King* v. *Pease* (13), and *Vaughan* v. *The Taff Vale Railway Company* (14)—a very unfortunate decision in my opinion. Fortunately, however, for the ends of justice there is, as it appears to me, a rule as well established as is the principle laid down in those cases—a rule according to which where any portion of a man's land is taken he is to have full compensation for the injury done to him by the taking of that land, although if no part of his land had been taken he would have to submit to bear his loss.

In this case it seems to me to be perfectly clear that the claimant has sustained substantial injury in his property in this land by reason of the execution of the works of the local board. To my mind it is clear that a man's land may have a value quite independent of its own intrinsic value. Men frequently, and most reasonably, sacrifice a portion of their land for the benefit of other portions of their land. For instance, a person who has a large building estate may sacrifice a considerable part of that estate at a nominal rental on the terms that it is to be held and maintained as a pleasure-ground, or as decorative land, so as to enhance the value of the rest of his property. It has been said, and necessarily said, by counsel on behalf of the public body in this case, that if that land held at a nominal rent is taken, the only compensation to be made is to be the capitalisation of that nominal rent, and that the body which acquires the land under the powers of the Act of Parliament is to hold it free and discharged from all the other covenants of the lease. That only needs to be stated for the gross injustice of it to appear. It is clear that the owner of the land sustains an injury by the loss of the land very different from the loss of rent. Suppose a mansion supplied with water from underground courses. If the land where the springs are found were bought, the person buying it could cut off the water from the mansion. No action would lie for that, and therefore the owner of the mansion retains the land and would be very unwilling indeed to part with it. The springs do not add to the intrinsic value of the land, and if the land is to be sold for the mere intrinsic value, and he is not to have compensation for the destruction of the water supply to his house, that would, as it seems to me, be very unreasonable. Therefore I can see excellent ground for holding, as has so long and constantly been held, that where land is taken and works are executed thereon, promoters must pay for the injury which their works are calculated to do to the remaining land of the owner.

It has in this case been said that the injury is not in the execution of the works. I am of opinion that it was in the execution of the works even in the strictest sense. One must look at sewage works, not as the mere putting up of bricks and mortar and so on in the form of sewage works, but as sewage works with every ordinary incident natural to sewage works.

I think the proper view was taken of this case on the enquiry before the undersheriff, and that there was no excess of jurisdiction in any wise in awarding compensation for the injury done to the remaining portion of the building property by a portion of it being used not for building purposes but for the purpose of carrying out upon those premises what are called sewage works. I am therefore clearly of opinion that this rule must be discharged.

Rule discharged.

Solicitors—Hedges & Brandreth, for claimant; Alexander Hemsley, for Local Board.

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(13) 4 B. & Ad. 30; 2 Law J. Rep. M.C. 36.
(14) 5 Hurl. & N. 679; 29 Law J. Rep. Exch. 247.

[IN THE COURT OF APPEAL.]

1885. July 2.

BRIDGER *v.* SAVAGE.*

Contract — Wagering — Agent commissioned to make Bets—Right of Principal to recover Money so received by Agent— 8 & 9 Vict. c. 109. *s.* 18.

The plaintiff employed the defendant to make bets for him upon commission. The defendant having done so received from the losers money in respect of bets so made which were won by him. The plaintiff claimed this money from the defendant, but the defendant refused to pay it on the ground that it was money won upon a wager, and therefore that the plaintiff could not recover, in consequence of the provisions of 8 *&* 9 *Vict. c.* 109. *s.* 18 :—Held, *that the plaintiff was entitled to recover; that the defendant had received the money for the use of the plaintiff; that the provisions of* 8 *&* 9 *Vict. c.* 109. *s.* 18 *only apply to the original contract between the two persons who make a bet, and that they do not make void a contract such as that which the plaintiff had made with the defendant.*

Beeston *v.* Beeston (45 Law J. Rep. Exch. 230) *approved.*

Beyer *v.* Adams (26 Law J. Rep. Chanc. 841) *overruled.*

Appeal by the defendant from the judgment of Lord Coleridge, C.J., at the trial without a jury.

The plaintiff, who stated that he had engaged the defendant to make bets for him upon commission, sued to recover from the defendant money which the defendant had received for bets so made which had been won and had been paid to the defendant by the losers. The defendant alleged that the money sought to be recovered was the proceeds of bets made by him with the plaintiff, and not of bets made by him as commission agent with other persons. Lord Coleridge, C.J., believed the plaintiff, and held that in the circumstances the plaintiff was entitled to recover from the defendant the money which the defendant had so received, and he gave judgment for the plaintiff.

The defendant appealed.

* *Coram* Brett, M.R., Baggallay, L.J., and Bowen, L.J.

Grantham, Q.C., and *Parsons*, for the appellant.—Even if the view taken of the facts by the Judge is right, still the plaintiff cannot recover money which is the proceeds of a wagering transaction, for by 8 & 9 Vict. c. 109. s. 18 "no suit shall be brought or maintained in any Court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager," and the plaintiff cannot recover such money even if he could sue on a cheque given for the amount. *Beyer* v. *Adams* (1), *Tenant* v. *Elliot* (2), *Oulds* v. *Harrison* (3), *Beeston* v. *Beeston* (4), and *Johnson* v. *Lansley* (5) were referred to.

Kemp, Q.C., and *Gore*, for the plaintiff, were not called on.

BRETT, M.R.—We cannot disagree with the finding of fact of the Lord Chief Justice, and I think that the circumstances of the case fortify the plaintiff's case. The plaintiff employed the defendant to make bets for him, and if these bets were won the defendant was to receive the money and to pay it over to the plaintiff, and this arrangement was made between the plaintiff and the defendant for the consideration that the plaintiff was to pay a commission to the defendant. This being so, the defendant makes bets on horse-races: if he wins, it is of course open to the person who loses the bet to pay it or not as he likes; but in this case the loser of the bet has paid, and the bet is settled and is out of the question. The position now is that the defendant has received money which he has already contracted to hand over to the plaintiff. There is no principle of law which prevents that contract from being a valid contract, for it is a perfectly legal contract. But it has been again urged that the provisions of 8 & 9 Vict. c. 109 make such a contract illegal. To this, then, it must again be answered, that however large the words of that statute may be, it has been decided that the whole of

(1) 26 Law J. Rep. Chanc. 841.
(2) 1 Bos. & P. 3.
(3) 10 Exch. Rep. 572; 24 Law J. Rep. Exch. 66.
(4) 45 Law J. Rep. Exch. 230; Law Rep. 1 Ex. D. 13.
(5) 12 Com. B. Rep. 468.

that statute applies only to the original contract between the two persons who make a bet, and not to such a contract as that with which we are now concerned.

In *Tenant* v. *Elliot* (2) Mr. Justice Buller said, "Is the man who has paid over money to another's use to dispute the legality of the original consideration? Having once waived the legality, the money never shall come back into his hands again. Can the defendant, then, in conscience, keep the money so paid? For what purpose should he retain it? To whom is he to pay it over? Who is entitled to it but the plaintiff?" And Lord Chief Justice Eyre said, "The defendant is not like a stakeholder. The question is whether he who has received money to another's use on an illegal contract can be allowed to retain it, and that not even at the desire of those who paid it to him. I think he cannot." Then *Johnson* v. *Lansley* (5) applied the same doctrine to the case of bets made on horse-races; and *Beeston* v. *Beeston* (4) is equally clear on this point. Baron Pollock there said, "The statute is directed against suits brought for recovering on any contract by way of wagering. That applies to actions brought by one party to a wager against the other, or by either party against the stakeholder." Decisions have been given to the effect that where a commission agent who is engaged to make bets does make bets in his own name, and the loser pays over the money lost, that money can be recovered by the principal from the person who has received it, on the ground that the contract between them is a valid common law contract. It is true that the case of *Beyer* v. *Adams* (1) is in favour of the argument urged by the appellant; and therefore, unless it can be distinguished on its facts from this case, we must hold that the time has come to say that it cannot be supported. I think it was clearly challenged by Baron Amphlett in his judgment in *Beeston* v. *Beeston* (4), and that he there shewed that it was inconsistent with the judgment in *Sharp* v. *Taylor* (6) which preceded it, where the Lord Chancellor Cottenham gave the decision. The judgment of Baron Amphlett will be found set out at greater length in 45 Law Journal Reports, Exchequer, 230, and in 33 Law Times Reports, 700, than in the Law Reports, and it is by the judgment so reported shewn that he not only thought there was good consideration for a cheque given by the defendant in payment of money by him on a joint account of himself and the plaintiff, though the money so received was the proceeds of a bet with some one else upon a horse-race; but also that in such a case as this the plaintiff would be entitled to recover. I therefore think this appeal fails.

(6) 2 Ph. 801.

BAGGALLAY, L.J.—I agree with the Master of the Rolls both on the question of fact and on the law applicable to this case. The decision of Vice-Chancellor Stuart in *Beyer* v. *Adams* (1) was given after the decision of *Sharp* v. *Taylor* (6); but that case was not cited to him, else I think he would have come to a different conclusion. *Beeston* v. *Beeston* (4) is an authority against the contention of the appellant, for, as Baron Pollock said in that case, the contract there was not illegal "at common law, nor by 9 Anne, c. 14, nor 5 & 6 Will. 4. c. 41, because those statutes only apply to securities between the parties wagering, and the statute 8 & 9 Vict. c. 109 only makes such contracts null and void, and not illegal, as is clearly expressed in *Fitch* v. *Jones*" (7).

BOWEN, L.J.—This case seems to me to be clear both on principle and authority. The principle is that the original wagering contract is void, but it is not illegal. A man who has lost a bet and then pays the money to the winner does nothing wrong; he merely waives the protection of the statute, and can give a good title, if one may use the phrase, to the money to the person to whom he pays it. Can it then be said that payment to an agent does not give a good title to his principal? The agent receives on behalf of his principal money belonging to his principal, and an action for money received will lie against him. The rights of the principal are not affected by the infirmity of the collateral transaction between the agent and the person with whom he made the bet. As to the authorities, in my opinion *Tenant* v. *Elliot* (2)

(7) 5 E. & B. 238; 24 Law J. Rep. Q.B. 293.

is directly in point and supports the plaintiff's claim. *Johnson* v. *Lansley* (5) also states the same principle. Baron Amphlett puts the rule on the true ground in *Beeston* v. *Beeston* (4). As to the decision in *Beyer* v. *Adams* (1), I agree that it can no longer be considered law; and as to the distinction between a bill and money I consider it is too fine to be supported.

Appeal dismissed.

Solicitors—Palmer & Bull, agents for Lamb & Evett, Brighton, for plaintiff; Baker, Blaker & Co., agents for Schomberg, Prince & Co., Brighton, for defendant.

[IN THE COURT OF APPEAL.]

1885. June 29, 30. } PERRY AND ANOTHER *v.* BARNETT.

Principal and Agent—Contract for Purchase of Bank Shares—Contract void under 30 *Vict. c.* 29. *s.* 1—*Custom of Stock Exchange—Ignorance of, on part of Principal—Liability of Principal to indemnify Agent.*

A principal who employs a stockbroker to purchase bank shares for him is not bound by the custom of the Stock Exchange to disregard the provisions of Leeman's Act (30 *Vict. c.* 29. *s.* 1) *if he is in fact ignorant of the custom: for a custom must, in order to bind a person who is ignorant of it, be reasonable, and it must not change the character of the contract directed to be entered into.*

The defendant directed the plaintiffs, who were stockbrokers at Bristol, to buy for him on the London Stock Exchange certain bank shares. The plaintiffs bought the shares through their London agents, and sent the defendant the contract-note, which, according to the usage and practice on the Stock Exchange, did not contain the numbers of the shares, as required by 30 *Vict. c.* 29; *and the defendant refused for that reason to accept or pay for the shares. By the rules of the Stock Exchange, a member who does not fulfil his contracts is expelled, and no application to annul a contract is entertained unless fraud or misrepresentation is alleged. The London brokers accordingly paid for the shares, and the Bristol brokers repaid them, and sued the defendant to recover the money thus paid. The defendant did not know of the custom to disregard the provisions of* 30 *Vict. c.* 29 *which makes a contract not made in accordance with it void:*—Held, *that the plaintiffs were not entitled to recover the money paid, as the defendant did not in fact know of the custom; that knowledge of a custom which was not reasonable could not be imputed to him; and that what he had authorised the plaintiffs to do was to make a valid contract, and not one which could not be enforced in law.*

Decision of GROVE, J. (*ante, p.* 351) *affirmed.*

Appeal by the plaintiffs from the judgment of Grove, J., at the trial without a jury.

The case is reported *ante*, p. 351.

The plaintiffs were stockbrokers at Bristol, and members of the Bristol Stock Exchange. The defendant gave them an order to buy for him 100 shares in the Oriental Bank. The plaintiffs wrote, as they informed the defendant they would, to certain stockbrokers on the London Stock Exchange who acted as agents for them, and these London brokers purchased from certain jobbers on the London Stock Exchange the required number of shares. No written contract was made between the broker and the jobber in London—no such written contract being ever made between brokers and jobbers on the London Stock Exchange, where the provisions of Leeman's Act (30. Vict. c. 29) are disregarded. The London brokers telegraphed to the plaintiffs informing them of the purchase, and the plaintiffs sent a memorandum of the purchase to the defendant, which memorandum did not contain the numbers of the shares, as required by 30 Vict. c. 29. s. 1. The shares were bought on the 2nd of May, for the account of the 15th of May, 1884. The Oriental Bank stopped payment on the 3rd of May, and on the same day the defendant called upon the plaintiffs and repudiated the

* *Coram* Brett, M.R., Baggallay, L.J., and Bowen, L.J.

purchase. The plaintiffs wrote to their London agents to cancel the contract; but the London agents answered that the contract was binding on the London Stock Exchange, and then forwarded the numbers of the shares to the plaintiffs, who thereupon sent to the defendant a contract-note containing the numbers of the shares, which the defendant declined to accept.

The plaintiffs brought this action to recover the price of the shares, and for commission.

Grove, J., who tried the case without a jury, found that the defendant did not know of the custom of the Stock Exchange to disregard the provisions of 30 Vict. c. 29, and gave judgment for him.

The plaintiffs appealed.

Finlay, Q.C., and *Horne Payne*, for the appellants. — The defendant must have known of the custom, so that the finding of the fact by Grove, J., cannot be supported; but even if he did not in fact know of the custom, the law will impute to him such knowledge, for he knew that Oriental Bank Shares would have to be bought on the London Stock Exchange, so that he must be taken to have authorised the plaintiffs to make a contract according to the customs of that Stock Exchange. The plaintiffs were bound to make a contract at once, and not to wait until they could get the numbers. The contract which has been made may be void by reason of 30 Vict. c. 29, but it is not illegal. The usage of the Stock Exchange in this matter does not change the character of the contract, it only affects the mode of performance. The defendant has authorised the plaintiffs to incur a liability, and the plaintiffs are entitled to be indemnified by the defendant against that liability. *Read* v. *Anderson* (1), *Seymour* v. *Bridge* (2), and *Cory* v. *Patton* (3) were referred to. *Neilson* v. *James* (4) can be distinguished, for the broker was there instructed to sell certain specific shares, so that he could have given the numbers and made a valid contract which could be enforced at law.

L. Smith, Q.C., and *T. Chitty*, for the defendant.—It was the duty of the plaintiffs to make a valid binding contract, so that the defendant was entitled to repudiate any contract which did not comply with all the statutory provisions necessary to render it capable of enforcement. The defendant was not in fact aware of this usage, and he cannot be presumed to be aware of a usage which disregards the statute and changes the character of the contract—*Robinson* v. *Mollett* (5). In *Read* v. *Anderson* (1) the defendant knew that the plaintiff had incurred a liability, and therefore he was held bound to indemnify him. *Neilson* v. *James* (4) is an authority in favour of the defendant, and establishes that a person cannot be bound by a custom or usage of which he is ignorant, unless it is reasonable and legal. In *Seymour* v. *Bridge* (2) the defendant knew of the custom.

Cur. adv. vult.

BRETT, M.R. (on June 30).—In this case the defendant, who was a merchant, conversant, as I think—at all events to a certain extent—with the business of the London Stock Exchange, instructed the plaintiffs, who were stockbrokers at Bristol, to obtain for him certain shares in the Oriental Bank. He knew that these shares would have to be procured in London, so that it seems to me his position is the same as though he had instructed a London broker to obtain the shares for him. The plaintiffs accordingly bought through their London agent on the London Stock Exchange the required number of shares, and this transaction was made according to the usages and rules of the London Stock Exchange. Such a contract made between the broker and the jobber ought, speaking strictly, to comply with the requirements of 30 Vict. c. 29; but in this contract, as in other similar contracts made on the London Stock Exchange, the provisions of that Act were disregarded: so that this contract which was made with the jobber was a contract which

(1) 53 Law J. Rep. Q.B. 532; Law Rep. 13 Q.B. D. 779.
(2) *Ante*, p. 347; Law Rep. 14 Q.B. D. 460.
(3) 48 Law J. Rep. Q.B. 181; Law Rep. 9 Q.B. 577.
(4) 51 Law J. Rep. Q.B. 369; Law Rep. 9 Q.B. D. 546.
(5) 44 Law J. Rep. C.P. 362; Law Rep. 7 H.L. 802.

could not be enforced at law. Nevertheless, the London Stock Exchange has, by rule 58, declared that no application to annul a bargain made upon the Stock Exchange will be entertained by the committee, unless it has been induced by fraud or wilful misrepresentation; and these rules provide further, that if the broker and the jobber do not carry out a bargain as to which such an objection cannot be made, the party who fails to do so will be declared a defaulter, and a member who is declared a defaulter ceases to be a member of the Stock Exchange. The London broker, therefore, paid the jobber for the shares, and as the Bristol brokers knew the rules and practice of the London Stock Exchange they were bound by them—to this extent at least, that they were bound to pay the London broker who had paid the jobber. The Bristol brokers thereupon sued the defendant, alleging that as they were by the rules of the London Stock Exchange obliged to pay for the shares comprised in this contract, therefore the defendant is liable to pay to them that which they have paid to the London broker. At the trial the plaintiffs attempted to prove that the defendant knew the customs of the London Stock Exchange; but Mr. Justice Grove, who tried the case, came to the conclusion that the defendant did not know of this particular custom at all events. The defendant protested so much, and professed such ignorance, that I think I should have been inclined to doubt whether he did not possess more knowledge than he was willing to admit; but Mr. Justice Grove, who saw him and had an opportunity of observing his demeanour, came to the conclusion that his evidence was to be believed, and I accept and act upon the conclusion of Mr. Justice Grove on this point, and for the purposes of this judgment I take it that the defendant did not know of this particular custom at all events of the London Stock Exchange.

But, further, the contention on behalf of the plaintiffs was, that even assuming this to be the fact, still the defendant must as a matter of law be taken to know the customs of the London Stock Exchange, because he instructed the plaintiffs to enter into a bargain which necessitated that they should deal upon the London Stock Exchange, and it is said that a person who directs another to deal in a particular market must be dealt with as though he knew the rules and customs of that market. I think that the law has recognised the proposition that a person who so instructs another person must be dealt with as though he knew many of the customs of the market in which he instructs him to deal, but I do not think that the principle has been carried to the extent contended for—namely, that he is to be considered to know all the customs of the market, however curious, unreasonable, or even illegal they may be; for a line of demarcation has been drawn between the kind of rules and usages by which such a person is bound and those by which he is not bound, although it is not always very easy to say exactly where the line is to be drawn. It is said that it is the universal practice of the London Stock Exchange habitually to disregard the provisions of 30 Vict. c. 29, because that statute attempted to put a bridle on speculation in bank shares, and thus diminished the business both of brokers and jobbers; and this being so, the London Stock Exchange is said to have come to the conclusion that it is not practicable to conduct business according to the provisions of that statute. The brokers and jobbers on the London Stock Exchange may no doubt carry on business amongst themselves upon that footing, and upon the terms of rule 58, which in effect provides that, however strange, unusual, or even oppressive a bargain may be, it must be carried out, unless a specific allegation of fraud or misrepresentation can be substantiated. This being so with respect to contracts amongst themselves, it is necessary to consider how the case stands, not only as amongst themselves, but also when the question is raised with respect to persons who are not members of the Stock Exchange. Whenever a custom is set up in Courts of justice the Courts must consider whether the custom is, if it is proved to exist, a custom which is within the bounds of reason, for if the custom is an unreasonable one it is a custom which the Courts will not recognise. Now, it seems to me that the usage which is embodied in rule 58, which is set

up as a custom, is beyond reason, and cannot be supported. Rule 58 says that "no application which has for its object to annul any bargain in the Stock Exchange shall be entertained by the committee, unless upon a specific allegation of fraud or wilful misrepresentation." Now, it seems to me that a custom which insists on the fulfilment of a contract which disregards the provisions of the Act known as Leeman's Act (30 Vict. c. 29), and insists on that under a penalty of expulsion from the Stock Exchange as a defaulter (for rules 144 and 145 provide that a member who does not fulfil his engagements shall be declared a defaulter and shall thereon cease to be a member), is an unreasonable custom.

The defendant in this case instructed the broker to buy shares, as the phrase commonly used calls it; but what he really did, and what he did in law, was to instruct him to make a contract for the purchase of bank shares. The defendant did not buy the shares from the broker. If a person instructs an agent to make a contract, that agent knows that what he is instructed to do is to make a valid and binding contract—that is, one which can be enforced; yet this custom which it is attempted to enforce in this case says that the agent may make a contract which is not a binding contract, and that he may in that respect disobey the instructions of his principal. It is said that the agent can make payments on such a contract, and can then make his principal liable, though the contract is one which is inconsistent with the instructions given to him. Such a custom is, in my opinion, unreasonable when the question is raised between a member of the Stock Exchange and such a person as the defendant in this case. I adopt the rule which I expressed in my opinion given to the House of Lords in *Robinson* v. *Mollett* (5), which comprises within it, I think, the rule which was laid down in *Neilson* v. *James* (4). Those two rules are correct, and even though it is proved as a fact that the alleged custom and rule do exist upon the London Stock Exchange, still I think it would be wrong to say that the defendant, who in fact did not know of the custom, must be treated as though he knew of it because he instructed the plaintiffs to enter into a bargain which he knew would necessitate their dealing upon the London Stock Exchange. Such a custom cannot be enforced against a person who is ignorant of it, so that the plaintiffs cannot succeed in this action, and this appeal must be dismissed.

BAGGALLAY, L.J.—The preamble of 30 Vict. c. 29 states:—"Whereas it is expedient to make provision for the prevention of contracts for the sale and purchase of shares and stock in joint stock banking companies of which the sellers are not possessed, or over which they have no control"; and then section 1 provides that certain formalities must be observed in contracts for the purchase and sale of bank shares, in default of which the contracts will be void.

It appears that the Stock Exchange ignores the provisions of this statute, and considers that it is impossible to make contracts for the purchase and sale of bank shares with reference to the distinguishing number of the shares, regard being had to the exigencies of business. The provisions of rules 52 and 58 of the Stock Exchange Rules have also been relied on by the plaintiffs, as they contend that those rules establish that they were obliged to pay for the shares comprised in the contract which was made by them, and therefore that the defendant is liable to repay to them the money so paid by them. It appears to me that what the defendant authorised the plaintiffs to do was to obtain a valid contract for the purchase of 100 bank shares. If it had been shewn that the defendant knew what the practice of the London Stock Exchange was as to Leeman's Act, I think the case would have been different. It has been argued that he is bound by all the rules and customs of the London Stock Exchange; but I think, as he did not know these customs, he can only be bound by such customs as are reasonable and proper, and that such a custom as this is not reasonable. I think the case of *Neilson* v. *James* (4) really decides this case. That was a case of a contract to sell bank shares, and it was held that rules or customs must, to be binding in such a

case, be reasonable and proper, for as the Master of the Rolls there said, "I am of opinion that the plaintiff can only be bound by a custom which is both reasonable and legal, for he cannot be assumed to take notice of an illegal custom of which he is in fact ignorant. Now the contract made by the defendant fails to comply with the provisions of 30 Vict. c. 29, and it is consequently void."

I agree that this appeal must fail; and I think that the decision of this case rests on the simple ground that the defendant authorised the plaintiffs to enter into a valid contract, that the plaintiffs did not do so, and that the defendant was ignorant of the custom which it has been alleged exists with respect to the provisions of 30 Vict. c. 29.

BOWEN, L.J.—I am also of opinion that the plaintiffs cannot succeed.

This question must be decided by the law of contract. What in this case was the contract between the principal and the agent? That is, in this as in all cases, a question of fact, a question which is sometimes to be answered by reference to written documents, and sometimes by inference from other established facts. This case is one of inference. What in this case was the respective knowledge of the principal and the agent as to the usage of the market in which these shares were bought? Mr. Justice Grove, who tried the case, has found as a fact that the defendant was not aware of certain customs of that market. I think the defendant must have known of some of the customs; and if the learned Judge had found that he had full knowledge of all, I should not have been dissatisfied; but I think that Mr. Justice Grove was in a better position to judge of this question than we are in this Court, and I acquiesce in his finding of fact.

I assume, therefore, imperfect knowledge on the part of the defendant. The effect of 30 Vict. c. 29 is, as has been said, to make contracts which do not comply with its provisions void; it does not make them illegal, it only renders them void if they are not made in a particular form. It appears that it is the practice on the Stock Exchange in London habitually to make invalid contracts, and then to treat them as though they were valid. The usage alleged and established is that such invalid contracts are considered to be valid, and brokers and jobbers alike are expected to be bound by them. I have no doubt but that a person may send a broker on to the Stock Exchange, and employ him to make a valid contract with respect to bank shares; and I believe that, speculative contracts apart, this can be done, due regard being paid to the provisions of Leeman's Act. But, without doubt, a broker can also be employed to make an invalid contract, as we know is not seldom done. In this case the defendant did not know of the provisions of Leeman's Act, 30 Vict. c. 29; but that fact does not cut the knot in this case, for the broker might assume that the defendant knew as much of the provisions of a public statute as he did himself; but Mr. Justice Grove has found that the defendant did not know of the usage of the Stock Exchange. Is, then, a man who employs a broker to deal in a particular market bound to know a usage of that market by which an invalid contract is made to take the place of and stand instead of a valid contract, and to know a custom which obliges a man who has ordered one thing to take another? The Courts have held that it is not reasonable to hold that a man can be affected by such a usage, unless he has been told of it or knew it beforehand. It is not reasonable that a man should be held bound to assume that a custom exists on a market which allows an agent whom he employs to make a valid contract, to make instead an invalid contract. The application to outside transactions of such a usage is inconsistent with the contract of agency itself. I think that we are bound by the decision in *Neilson* v. *James* (4), with which I agree; and I think we are also bound by the principle contained in *Robinson* v. *Mollett* (5), as expressed, as it seems to me, in a manner substantially identical both by the present Master of the Rolls, then advising the House of Lords, and by Lord Chelmsford. That principle has been stated thus, that a custom of trade may control the mode of performance of a contract, but cannot change its intrinsic character, so that if a broker is employed

by a person to transact for him upon a market with the usages of which the principal is unacquainted, the principal gives the broker authority to make contracts upon the footing of such usages provided they are such as regulate the mode of performing the contract and do not change its intrinsic character. If, therefore, a broker is employed to make a contract, he can, I think, import into it usages which affect the mode of performance of the contract, but not, in the absence of knowledge, usages which go farther and alter the nature of the contract itself. I do not think we are overruling the judgment of Mr. Justice Mathew which has been referred to, for Mr. Justice Grove distinguished this case from that of *Seymour* v. *Bridge* (2), because there was in that case knowledge which did not exist in this case, and that absence of knowledge makes a substantial difference.

Appeal dismissed.

Solicitors—Ley & Lake, agents for Danger & Cartwright, Bristol, for plaintiffs; Meredith, Roberts & Mills, agents for Vassall, Parr, Osborne & Ward, Bristol, for defendant.

1885. June 4.

KIMBER *v.* PARAVICINI.

Church and Clergy—Ecclesiastical Dilapidations Act, 1871 (34 & 35 *Vict. c.* 43) *— Powers of Sequestrator — Repairs to Rectory—Report of Surveyor.*

Since the passing of the Ecclesiastical Dilapidations Act, 1871 (34 & 35 *Vict.* c. 43), *the decision as to what sums are required to be expended upon the repairs of a living is vested in the diocesan surveyor. A sequestrator has therefore no power to spend a sum in repairing the dilapidations beyond what is reported to be necessary by such surveyor without getting a further survey or report.*

This was a motion to disallow certain items of expenditure incurred by the sequestrator in repairing the rectory house and glebe premises of the sequestrated living of Avening, in the county of Gloucester. It appeared from the Master's report that in 1874 the diocesan surveyor had been directed by the bishop, under the Dilapidations Act, 1871, to inspect the glebe buildings, and to report upon the dilapidations, and estimate the cost of the repairs. The surveyor sent in his report, and estimated the cost of repairs at 140*l.* There were no objections to the report stated to the bishop in accordance with the provisions of 34 & 35 Vict. c. 43. s. 16, and the report accordingly became final. In 1875 the sequestrator visited the glebe premises, and from such inspection arrived *bona fide* at the conclusion that very considerable repairs were necessary to the due maintenance of the building, and that the estimate of the surveyor was wholly inadequate, and moneys amounting to a total of 780*l.* 18*s.* 10*d.* were from time to time expended by order of the sequestrator for what he believed to be necessary repairs. Objections were from time to time made by the defendant to the expenditure which was being made upon the buildings of the benefice, on the ground that the sequestrator had no right to expend any sum beyond that named in the report, and that the repairs were unnecessary. The sequestrator, on the other hand, contended that the sum of 140*l.* authorised by the surveyor's report was insufficient, and that the repairs done by him were, according to the law ecclesiastical, proper and necessary as dilapidations (1).

(1) By the Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43), section 12, "it shall be lawful for the bishop, on the complaint in writing of the archdeacon, or of the rural dean, or of the patron of a benefice, that the buildings of the benefice are in a state of dilapidation, or at the request of the incumbent, to direct the surveyor to inspect the buildings of the benefice or any of them: provided always that a copy of such complaint shall be forwarded by the bishop to the incumbent and the sequestrator, if any, one month before such inspection shall be ordered."

Section 13: "As regards a benefice under sequestration at the time of the commencement of this Act, the bishop may, at any time during such sequestration, and as regards a benefice thereafter put under such sequestration, the bishop may, within six months after such se-

Jeune, for the incumbent, in support of the motion.—Since the passing of 34 & 35 Vict. c. 43, it is the province of the diocesan surveyor to determine the amount of money which is required to be spent upon the repairs of a living, and the sequestrator was not justified in spending moneys save in accordance with the provisions of that statute. To decide otherwise would be to render the Act nugatory. Section 72, which is relied upon by the other side, merely intended to preserve the judicial position of bishop, ordinary, and archdeacon, and not the powers which a sequestrator might have had prior to the Act. He cited *Jones* v. *Dangerfield* (2).

Ram (*Arthur Charles, Q.C.*, with him), for the sequestrator.—Prior to the Act of 1871 it will not be disputed that the sequestrator's action would have been in accordance with law, provided the repairs were reasonable. It is submitted that that Act merely substituted an alternative procedure; section 72 expressly securing the rights of the bishop in directing repairs. The sequestrator, being the bishop's bailiff, was therefore entitled to proceed as he had done.

LORD COLERIDGE, C.J.—With all respect to Mr. Ram's argument, to which I have listened with attention, the conclusion to which he invites us to come seems to me to be monstrous. Prior to the Act of 1871, a sequestrator, having to administer the profits of a benefice, was bound to execute works and to perform certain duties out of the profits of a benefice, among these being the sustentation of the buildings and the maintenance of divine service. A sequestrator could be made liable at common law, or by a process peculiar to the Ecclesiastical Courts. In 1871 the law was remodelled, and an elaborate system was created whereby the exact amount of liability on account of dilapidations could be ascertained; and when once this had been got rid of there was a complete discharge. The contention of the sequestrator here has been that he, being placed by the bishop to pay debts, is thereby free from the compulsory provisions of the statute to which I have referred. But there are elaborate provisions which say that the sequestrator shall be bound by the Act of Parliament, and he, as well as the incumbent, has power to make certain objections to the diocesan surveyor's report. There was here a report stating that the sum of 140*l.* was to be expended, notwithstanding which report the sequestrator here has proceeded to spend further sums without getting any further report. The effect of yielding to the contention put forward on behalf of the sequestrator would be, as it seems to me, to take away the most salutary provisions of this Act of Parliament. The example afforded by this case shews how dangerous it would be thus to interpret the law. The terms of section 72 afford the only ground for the contention

questration issued, direct the surveyor to inspect as aforesaid, and such inspection shall be renewed in every fifth year while such benefice shall be under sequestration."

Section 14: "The surveyor shall, as soon as conveniently may be after such direction, inspect, and within one month after such inspection send to the bishop a report of the result of the same, and shall send a copy to the incumbent and to the sequestrator, if any."

Section 15: "Where the surveyor shall report that any works are needed for putting into repair any dilapidated building belonging to a benefice, he shall report—1. What works are so needed, specifying the same in detail; 2. What he estimates to be the probable cost of such works; 3. At or within what time or times such works respectively ought to be executed."

Section 16: "The incumbent or the sequestrator, if any, may, within one month after the sending the said copy, state in writing to the bishop objections to the report on any grounds of fact or law; and in such case the bishop may, if he shall think fit, at the expense of the party objecting, direct a second report to be made by another surveyor, or take the opinion of counsel upon any question of law; and the bishop shall, after due consideration of the whole matter, give his decision in writing. If no objections to the report shall be made, then, at the end of the period limited for making objections thereto, the report shall be final; and if objections shall have been made, then the report as modified by the bishop's decision shall be final."

Section 72: "Nothing in this Act contained shall be construed to lessen or destroy any authority or power which before the passing of this Act any bishop or archdeacon or other ordinary possessed in respect of requiring the repairs of any ecclesiastical buildings to be executed."

(2) 45 Law J. Rep. Chanc. 161; Law Rep. 1 Ch. D. 438.

put forward on behalf of the sequestrator; but that is only a general saving clause enabling a bishop to require repairs to be done, and it clearly did not mean to provide that under circumstances such as these the sequestrator might, if he chose, dispense with the Act altogether.

MATHEW, J.—I am of the same opinion. The Act of 1872 was intended to protect an incumbent, and section 72 cannot be construed so as to mean that there should be a dispensing power to dispense with an Act of Parliament. Our decision must be in favour of Mr. Jeune's client.

Motion allowed.

Solicitors—Clarke, Rawlins & Co., for sequestrator; Burton, Yates, Hart & Burton, for defendant.

[IN THE HOUSE OF LORDS.]

1885. April 24, 27. May 12.

THE MAYOR, ETC., OF PORTSMOUTH *v.* SMITH AND OTHERS.

Street—Expense of Paving—Liability of Adjoining Owners—Local Authority—Towns Improvement Clauses Act, 1847 (10 & 11 *Vict. c.* 34), *s.* 53.

The Towns Improvement Clauses Act, 1847 (10 & 11 *Vict. c.* 34), *enacts, in section* 53, *that "If any street, although a public highway at the passing of the special Act, have not theretofore been well and sufficiently paved and flagged or otherwise made good," the local authority may pave, &c., such street at the expense of the adjoining owners; and "thereafter such street shall be repaired" out of the rates. The interpretation clause enacts that "the word 'street' shall extend to and include any road, square, court, alley, and thoroughfare within the limits of the special Act." In* 1857 *a special Act was passed, incorporating the above provisions amongst others of* 10 & 11 *Vict. c.* 34, *and in* 1864 *a provisional order applied it to P. In* 1875, *the plaintiffs, the corporation of P., at their own expense, by agreement with the adjoining owners, widened and improved a public highway within the limits of the special Act, and gravelled, channelled, and kerbed a footpath at the side of the highway; but they did not then pave or flag it. In* 1879, *the plaintiffs, acting as the local sanitary authority, paved and flagged the footpath, and then sought to recover the expense of so doing from the defendants, as the owners of adjoining lands.*

It was found by a jury that the road in question was not in 1879 *a street in the popular sense of the word, and that it had been made good in* 1875:—

Held, *that the defendants were not liable, on the ground that the road had been theretofore made good, the House not deciding whether it was a "street" within the meaning of section* 53.

The word "theretofore" in section 53 *means, "before the work is done by the commissioners," not "before the passing of the special Act."*

This was an appeal from a decision of the Court of Appeal which reversed one of Lindley, L.J.

The case is reported in the Court of Appeal 53 Law J. Rep. Q.B. 92; Law Rep. 13 Q.B.D. 184, where the judgment of Lindley, L.J., is also given.

The facts are set out in the reports above mentioned, and in the judgment of Lord Blackburn.

Bompas, Q.C., and *Pitt Lewis*, for the appellants.—The road was in 1879 a "street" within the meaning of section 53 of the Towns Improvement Clauses Act. The word is there used in the meaning given to it by the interpretation clause. See the heading which precedes clauses 47–56.

It is contended for the appellants that "otherwise made good" in section 53 refers to something of a like nature to paving or flagging, such as laying down asphalte, not to mere gravelling. The commissioners would naturally wait till such paving or making good was required, by reason of the road having become a street in the popular sense. They cannot be deprived of their right to flag the footpath when the proper time comes, merely because a private owner had gravelled it when such gravelling was sufficient. "Theretofore" in section 53 naturally and grammatically means

"before the passing of the special Act." This construction is supported by the preceding and subsequent sections.

If it be held that gravelling is a making good within the section, it is contended that the true construction is that the commissioners may gravel once, and may afterwards pave and flag once. This construction is supported by sections 150 and 152 of the Public Health Act.

The case of *Robinson* v. *The Local Board of Barton Eccles* (1) is no authority against the appellants on the meaning of "street," for the effect of that decision was not to restrict the interpretation of "street," but to extend that of "new street" so as to include the case where a street in the legal sense had become a street in the popular sense.

Charles, Q.C., E. U. Buller, and *Bovill Smith*, for the respondents, were not called upon.

LORD BLACKBURN (on May 12).—This is an appeal against an order made by the Court of Appeal, by which the judgment of Lindley, L.J., on further consideration for the plaintiffs was set aside, and judgment entered for the defendants with costs instead.

The counsel for the appellants were fully heard at your Lordships' bar; when they concluded it was not convenient at that time to hear the further argument. The further consideration was therefore postponed *sine die*, and it was at the same time intimated that if the House required to hear further argument notice would be given to counsel.

I have, without calling on the respondents' counsel to argue, come to the conclusion that the order appealed against is right.

There is, I think, now no controversy on the state of things before 1874.

Milton Lane was in 1857 a country lane, being a highway, but in no popular sense of the word a street, and then lying entirely outside the borough of Portsmouth. The site of this lane was included in the ambit of a local Act, 20 & 21 Vict. c. xxxvii., called the Landport and Southsea Improvement Act, 1857. That Act by the 16th section incorporated part of the Towns Improvement Act, 1847 (10 & 11 Vict. c. 34), and by the 20th section enacted that in construing the Towns Improvement Act, 1847, in connection with that Act, sections 53, 54, and 73 should be read as if the word "owners" were substituted for "occupiers." Section 34 was, "Nothing in this Act or in any Act incorporated herewith contained shall empower the commissioners to charge the owners of any land with the expenses of paving, flagging, making, or repairing any footways passing solely through a field or fields." It is not disputed that Milton Lane was not a footpath passing solely through a field or fields, but a highway. I do not think it is material to notice any more of the Landport and Southsea Improvement Act.

In 1874, but not before, some alteration was made in Milton Lane (as to which more must be said hereafter), and its name was then changed to Asylum Road.

The mayor, &c., of Portsmouth were in 1864 the local board acting for the borough of Portsmouth, forming a district in which the Local Government Act, 1858, had been adopted. On their petition as to three local Acts, of which the 20 & 21 Vict. c. xxxvii. was one, the Secretary of State made a provisional order, confirmed by the Local Government Supplemental Act, 1864 (No. 2). I will now read the material parts of that order—"Now, therefore, in pursuance of the powers vested in me by the said Local Government Act, I, as one of her Majesty's principal Secretaries of State, do by this provisional order under my hand direct that from and after the passing of any Act of Parliament confirming this order—1. The said hereinbefore recited local Acts, except the parts thereof specified in the schedule hereunto annexed, shall be repealed." "5. The provisions of the said hereinbefore recited local Acts not hereby repealed and of the Acts incorporated in whole or in part with the said hereinbefore recited local Acts or any of them shall, except as hereinafter provided, extend to the whole of the said district, and shall be incorporated with the said Local Government Act, and the said local board shall be the commissioners for executing the said Acts; provided that sections 34 and 35 of the said firstly herein-

(1) 52 Law J. Rep. Chanc. 5; Law Rep. 8 App. Cas. 798.

before recited local Act, and section 102 of the said secondly hereinbefore recited local Act, and sections 47 and 50 of the said thirdly hereinbefore recited local Act, shall apply only to the districts to which they respectively applied before the passing of any Act confirming this present order. Given under my hand, this eleventh day of June, one thousand eight hundred and sixty-four. (Signed) G. Grey. Schedule to which this order refers.—The sections to be retained in the hereinbefore recited local Acts are: 3. In the said thirdly hereinbefore recited Act (20 & 21 Vict. c. xxxvii.) the 16th section, in so far as it incorporates the following sections of the Towns Improvement Clauses Act, 1847—namely, sections 53, 98, 147 to 151 (both inclusive), 196, 197—and the section numbered 20, in so far as relates to the interpretation of the 53rd section of the Towns Improvement Clauses Act, 1847; 32, 34, 47, 49, and 50. So much of section 61 as relates to the incorporation of the Waterworks Clauses Act, 1847. So much of section 84 as relates to abusive language; 85, 86, and 97, except as to the first proviso of the last hereinbefore recited section."

The 53rd section of the Towns Improvement Clauses Act, 1847, was incorporated in the local Act 20 & 21 Vict. c. xxxvii., in 1857, with the slight alteration of "owners" for "occupiers," and that section still remained after the provisional order was in force. It is a common practice in modern Acts to introduce interpretations into Acts. I am old enough to remember when that was a novelty, and, the older draftsmen said, likely to be a very mischievous novelty. I think that experience has shewn that the older draftsmen had some reason, but the practice is now inveterate.

In the Towns Improvement Clauses Act, 1847, it was enacted (section 3), "The following words and expressions in both this and the special Act, and any Act incorporated therewith, shall have the meanings hereby assigned to them unless there be something in the subject or context repugnant to such construction. The word 'street' shall extend to and include any road, square, court, alley, and thoroughfare within the limits of the special Act."

Milton Lane, in 1857, and thence down to 1874, was admittedly not a street in the ordinary and general sense of the word, which has reference to houses, or at least to sites for houses, in some degree of contiguity, but it was both a "road" and a "thoroughfare." In 1874, the mayor, aldermen, and burgesses of Portsmouth, by articles of agreement under seal, bought from the now respondents seventy-five acres of land for the purpose of making a lunatic asylum. These seventy-five acres were bounded on the north by Milton Common Lane, with which, as I understand it, we have nothing to do in this case, and on the south by a public road. This I understand to be that which was then called Milton Lane, and is now called Asylum Road. It was part of the bargain between the corporation and the vendors that "the vendors shall set back the land on the north and south sides of the said roads, so that the same may become and be made of a uniform width of forty feet between the points C. and D. on the north, and the points E. and F. on the south, as shewn on the plan hereinafter referred to, and the expenses of widening and making up the said road shall be borne by the corporation." On reference to the plan, it appears that from E. to F. is a part of Milton Lane, where the land on the north belonged to the vendors. From F. onwards towards the east, the land on the north of Milton Lane was bought by the corporation to build on it their new asylum.

The bargain was carried out, the vendors set back the land, and the road was widened. On part of the land thus added to the road a footpath was made. All expenses of "making up" the widened road and the footpath were paid by the corporation. This was completed about 1875.

In 1879, three or four years after this was done and paid for by the corporation of Portsmouth in their capacity of purchasers of the land for the purposes of making an asylum, they, in their capacity as urban authority, caused the footway which had been laid down in 1875 to be paved and flagged. This action is brought to recover from the respondents as owners of the land on the north side of Asylum Road the expenses of so doing. The cause came on for trial before Lindley, L.J., and a jury, of whom eight had a view. Lind-

ley, L.J., reserved the case for further consideration, but took the opinion of the jury on all questions which the counsel on either side contended were, or might be, questions for the jury, reserving to himself, on further consideration, if he thought any of them were questions for the Court, to decide them for himself—and I do not see how any better course could have been pursued.

The road or thoroughfare called Milton Lane was in 1857, and before, a highway. It seems clear that, after some skirmishing, it was admitted that it was a highway repairable by the parish, and consequently, if that be material, after 1857 repairable by the commissioners under section 49 of the Towns Improvement Clauses Act, 1847; but it was neglected. It was not, in fact, paved or flagged at that time, and indeed the land on which the footway now in question has been made was not then, nor at least till 1875, a part of the road. The portion of the summing up which I shall now read shews plainly what the questions left to the jury were:—

"Exercising your own judgment, you must consider now it is admitted as an important fact that in 1875 the corporation widened this road, and did it under an agreement with the present defendants, and that the expense of making up this road and so on should be made and borne by the corporation, and although the agreement with the present defendants does not say anything about the footpaths, the mode in which the corporation understood what they were to do in making up the road is shewn by what they did; and we know as a fact that they did make this road, they did metal the carriage path when they made up the footpath in this way, that they put kerbstones and proper channels, and they made it up—that is to say, they did something to the footpath, they put gravel upon it, and put it in such a way as that it is admitted it was a good gravel path. That is not denied. Now the question is, whether that is not sufficiently 'otherwise made good'; I confess if it were for me—I do not know that it is for me, but if I had to decide that, and it should be altogether a question of law, I should be of opinion that that was made good. But again I agree that this is rather a question for you than for me. There are the facts. It really depends upon this, 'otherwise made good,' for what purpose? Common sense would suggest it must be for the purpose for which it is used. Bear in mind, now, it is conceded in 1879, and years before, there were no houses on the north side of this lane; and if there is a good gravel footpath, I do not see myself that that is not sufficiently good for all the purposes. It may be a question for you or for me, but in order to save further expense, I will ask you these two questions: whether this place was a street in the popular acceptation of the term in 1879, before it was flagged and paved? or was the footpath on the north side sufficiently made good before the corporation dealt with it? Will you be kind enough to answer those two questions, and then I will dispose of the knotty point which may arise in the way I shall be advised. The jury considered. *The Associate:* Gentlemen, are you agreed? *The Foreman:* Quite agreed. *The Associate:* What do you find? *The Foreman:* That it was not a street in the popular sense of the word, and it was otherwise made good."

The Judge did not put to the jury any question as to the distinction between the capacity of the corporation in what they did in 1874–75 when building the asylum, and their present capacity as urban authority acting as commissioners under the provisional order. That could hardly be supposed to be a question for a jury.

On further consideration, Lord Justice Lindley expressed himself as agreeing with all that the jury had found, and, I think, would have given judgment for the defendants but for the construction which he felt obliged to put on the word "theretofore" in the 53rd section. He thought it necessarily must be construed as meaning before the passing of the special Act, that is, in this case, in 1857. And it being quite clear that this footway in question had not been in any sense made good till long after 1857, he gave judgment for the plaintiffs.

Where a single section of an Act of Parliament is introduced into another Act, I think it must be read in the sense which it bore in the original Act from which it is taken, and that consequently it is perfectly legitimate to refer to all the rest of

that Act in order to ascertain what the section meant, though those other sections are not incorporated in the new Act. I do not mean that if there was in the original Act a section not incorporated, which came by way of a proviso or exception on that which is incorporated, that should be referred to. But all others, including the interpretation clause, if there be one, may be referred to. It is a dangerous mode of draftsmanship to incorporate a section from a former Act; for unless the draftsman has a much clearer recollection of the whole of the former Act than can always be expected, there is great risk that something may be expressed which was not intended.

I think, therefore, that the clauses 54 and 55, though not incorporated by the order, were properly referred to as throwing light on the 53rd section which was; and I think also that the interpretation clause (which, I may observe in passing, is not the same as the interpretation of the same word "street" in the Public Health Act, and does not contain the word "highway") was properly referred to.

If I came to the conclusion that on the true construction of the Towns Improvement Clauses Act, 1847, the Legislature had said that if any road or thoroughfare in the district (even one so thoroughly rural that there was then no pretext for saying that it was in the popular sense of the word a street), although a public highway at the time of the passing of the special Act—that is, in this case 1857—had not before that time, 1857, been well and sufficiently paved, flagged, or otherwise made good, the commissioners might at any time (in this case 1879), even though there had been no such change by building of houses or otherwise as to make it now a street (as meaning something more than a mere country road), in their discretion, cause it to be paved, flagged, or otherwise made good at the expense of the owners of the land abutting on the road or thoroughfare, I do not see how, as a Judge, I could do otherwise than give effect to the expressed intention of the Legislature, and support the judgment of Lord Justice Lindley.

I might think the Legislature improvident and unwise, and that the owners of the land were hardly treated, but I should feel obliged to carry out the expressed intention of the Legislature.

There might still be an answer if the commissioners themselves had before 1879 otherwise made good the road, as they would from that time be liable to repair the street. The Master of the Rolls thought that what was done by the corporation of Portsmouth in 1875, in pursuance of the bargain they made in 1874, when buying land on which to build the asylum, would have been illegal unless done by the same corporation in their capacity as urban authority, and that it ought, therefore, to be inferred that they did it in that capacity, and consequently that since 1875 they were bound to keep the street as such in repair.

I am inclined to think that the capacity of the corporation of Portsmouth when purchasing land for the purpose of making an asylum is distinct from their capacity as urban authority; and that what was done in 1875 should have the same effect and no more than if the purchase had been by a county authority for the purpose of making a county asylum. I do not decide this, and go no further than to say that I should not affirm the order on this ground without at least calling on the respondents' counsel to argue in support of this position.

But the case is very different if the true construction of the Towns Improvement Clauses Act, 1847, be that at any time when the state of the neighbourhood becomes such as to make it proper to pave, flag, or otherwise make good a road to an extent which would not have been required so long as it was merely a rural highway, the commissioners may, although the road was a highway at the time of the passing of the Act (in this case 1857), pave, flag, or otherwise make good the road at the expense of the owners of the adjoining land, unless theretofore—that is, before that time—the road had been already well and sufficiently paved, flagged, or otherwise made good. If the finding in this case, that the road was not in 1879 a street in the popular sense, is true, I doubt whether the urban sanitary authority could then, under any circumstances, pave the road at the expense of the adjacent landowners, though if they had waited till more houses

were built they probably could have done so; but it is not necessary to say how that is.

But if, on the construction of the whole Act, the word "theretofore" in the 53rd section of the Towns Improvement Act, 1847, refers not to the time of the passing of the special Act (in this case 1857), but to the time when the commissioners caused such street to be paved and flagged or otherwise made good (in this case 1879), then, on the findings of the jury that the footway had been otherwise made good before 1879, I think the judgment should be for the defendants.

I think there is no doubt that in construing an Act you are to give effect to the intention of the Legislature appearing on the whole Act from the words used, and that the words are to be construed in their ordinary grammatical meaning, or, as the Master of the Rolls perhaps more accurately says, in their "ordinary idiomatic" meaning. And I think there is a rule of construction commonly expressed thus, that "words of relation refer to the last antecedent." Some subtle remarks on this rule by Lord Bramwell in *Ewing* v. *Ewing* (2) may be perused with interest. I do not think that the "last antecedent" is necessarily the nearest, nor even that the word "antecedent" is confined to what in the collocation of words comes before the word of relation. I think that if the words of this section had been slightly transposed, and, to avoid any difficulty about the interpretation clause, the words of that clause had been used instead of "street," and, abridging it, it had read thus: "If any road had not theretofore been well and sufficiently made good, the commissioners may cause such parts thereof as have not theretofore been well and sufficiently made good to be made good in such manner as they think fit, although the road was a public highway at the passing of the special Act," no one could well have doubted that the grammatical or idiomatic meaning of the words would be to refer "theretofore" to the time when the commissioners acted. That, though coming after the word of relation, would, I think, be an antecedent within the grammatical or idiomatic rule I have referred to.

Lord Justice Baggallay does not transpose the words, "although a public highway at the passing of the special Act," as I have done, but reads them as if in a parenthesis. The Master of the Rolls seems to say that the rule of idiomatic English that the relative is to refer to the "antecedent" is so strong that though of necessity when there is no antecedent you must make the relative relate to something subsequent, you must not do so if there be anything antecedent to which it can relate. I cannot agree in this.

The cases which were cited do not, I think, give much help. *Robinson* v. *The Local Board of Barton Eccles* (1) was on a different Act, and a different clause, and a different interpretation clause. I should say that the great judicial difficulty felt in construing that Act is a strong proof of the soundness of the objection of the old school of draftsmen to the introduction of interpretation clauses.

As I agree with Lord Justice Baggallay in his interpretation of this Act, I think on that ground that the order appealed against should be affirmed, and the appeal dismissed, with costs.

Lord Watson.—I am of opinion that the order of the 12th of December, 1883, must be affirmed, although I do not concur in all the reasons which influenced the learned Judges of the Court of Appeal.

The jury have found that in 1879, at the time when the appellants executed the operations the cost of which they are seeking to recover from the respondents, the road or lane now known as Asylum Road "was not a street in the popular sense of the word." Upon that finding, the appellants could not recover, if the word "street" is used in its popular acceptation in section 53 of the Towns Improvement Clauses Act, 1847. That section is detached from its group of clauses relating to the paving and maintenance of streets in the Act of 1847, and is incorporated *per se* with the Portsmouth provisional order of 1864, confirmed by the Local Government Supplemental Act, 1864 (No. 2). I agree with the learned Judges of the Courts below that section 53 must,

(2) 8 App. Cas. 831.

notwithstanding, for the purposes of this case, be read in the light afforded by the interpretation clause and context of the Act of 1847. There does not appear to be anything in the terms of the provisional order of 1864 which can alter or qualify its original meaning in the statute of 1847. I am unable at present to concur with the learned Judges who have held that the word "street," as it occurs in section 53, embraces every kind of road or highway which, according to the interpretation clause (section 3), it may include. I very much doubt whether it was the intention of the Legislature to empower the commissioners to pave and flag mere country roads at the expense of the occupiers (or in the case of Portsmouth the owners) of the adjoining lands. At the same time I think a road might fairly be held to be a street within the meaning of section 53 although it did fall somewhat short of the popular idea of a street. If, for instance, a road were laid out as a street, in this sense, that preparations were being made for erecting buildings which on their erection being completed would make it in popular acceptation a street, it rather appears to me that the commissioners would be entitled to deal with the road in virtue of the powers given them by section 53. But I have found it unnecessary to form a deliberate judgment upon this part of the case, because I am of opinion that, assuming the appellants to have been warranted in treating Asylum Road in 1879 as a "street" falling under the provisions of section 53, the respondents are yet entitled to prevail on other and independent grounds.

The owners of lands abutting on a street which has been paved by the appellants professedly in terms of section 53 have, in my opinion, a good defence to any claim made upon them for the cost of paving, if they can shew that, before the work was executed by the appellants, the street had been "well and sufficiently paved and flagged or otherwise made good." The word "theretofore" is, no doubt, capable of receiving two different constructions; it may be held to refer either to the time when the work is executed by the commissioners, or to the time when the special Act was passed. I prefer the construction adopted by Lord Justice Baggallay. I agree with his Lordship that the words "although a public highway at the passing of the special Act" are parenthetical; and in that view it appears to me to be more natural as well as more reasonable to connect the word "theretofore" with the period of the commissioners' operations.

The jury have found that the footpath of Asylum Road, so far at least as the respondents' lands abut upon it, though neither paved nor flagged, had been "otherwise made good" before the appellants proceeded to pave it in 1879. It was proved at the trial that about the year 1874, in the course of widening and making up Asylum Road under an agreement between the respondents and the corporation of Portsmouth, that part of the footpath which is now in question was kerbed, channelled, and made up with gravel. It was maintained for the appellants that your Lordships ought to disregard the finding of the jury in respect that a footpath so constructed could in no circumstances be regarded as "otherwise made good" within the meaning of section 53. It was argued that in order to satisfy the statute the footpath must have been formed with wood or asphalte, or some similar material. In short, the materials suggested as the only possible equivalents for paving or flagging permitted by the expression "otherwise made good" were all such as are used to form what, in common language, is termed pavement. That cannot, in my opinion, be the meaning which the Legislature intended to convey by that expression. I cannot from my own experience say that a footpath in a street cannot be made sufficiently good for all reasonable purposes by kerbing, channelling, and gravelling; and even if I had to decide the question which was submitted to the jury, I should hesitate to differ from their conclusion.

These appear to me to be sufficient reasons for affirming the order appealed from. I desire to add that if a street has been sufficiently paved, flagged, or otherwise made good before the commissioners proceed to pave, it is immaterial for the purposes of section 53 to consider by whom that may have been done. In the present case the operations, upon which the finding

of the jury was based, must, in my opinion, be attributed to the joint action of the respondents and the corporation of Portsmouth. But the corporation appears to me to have acted in the matter as the borough authority under the Lunatic Asylums Act, 1853, and as such having interests and duties altogether different from those with which they are charged in their capacity of urban sanitary authority. I cannot therefore assent to the view that the present appellants made good the footpath in or after the year 1874.

LORD FITZGERALD.—I also am of opinion that the judgment of the Court of Appeal should be affirmed, and for the reasons shortly expressed by Lord Justice Baggallay. The case exhibits remarkably a state of legislation for local purposes so complicated and so difficult to apply as not to be a credit to us, and which no doubt has caused and will continue to cause a great deal of expensive litigation.

Order appeal from affirmed; and appeal dismissed, with costs.

Solicitors—Williamson, Hill & Co., agents for Alexander Hellard, Portsmouth, for appellants; Ford & Ford, agents for R. W. Ford & Sons, Portsmouth, for respondents.

1885. March 21. April 16.

THE BRISTOL WATERWORKS COMPANY (*appellants*) *v.* UREN (*respondent*), AND UREN (*appellant*) *v.* THE BRISTOL WATERWORKS COMPANY (*respondents*).

Waterworks Company—Water Rents—"Gross Sum assessed to the Poor Rate"—Annual Rack-rent or Value—Water Supply for Domestic Purposes—Premises supplied including Garden.

[For the report of the above case, see 54 Law J. Rep. M.C. 97.]

1885. June 16.

SYMONS AND WIFE *v.* LEAKER AND ANOTHER.

Easement—Right of Way—Life Estate in Servient Tenement—"Reversion"—Meaning of, as distinguished from "Remainder"—Prescription Act (2 & 3 *Will.* 4. *c.* 71), *s.* 8.

By section 8 *of the Prescription Act* (2 & 3 *Will.* 4. *c.* 71), *where the land over which the right of any way shall have been enjoyed has been held under or by virtue of any term of life, the time of the enjoyment of any such way during the continuance of such term shall be excluded in the computation of the said period of forty years, in case the claim shall within three years next after the end or sooner determination of such term be revoked by any person "entitled to any reversion expectant on the determination thereof":*—Held, *that the word "reversion" is to be read in its strict legal signification, and does not include "remainder," and that a remainderman cannot avail himself of the provisions of the section to resist the claim within three years of his remainder falling into possession on the termination of the preceding life estate.*

This was an appeal, by way of Special Case, from the County Court of Devonshire holden at Newton Abbot.

The action, which was tried in July, 1884, before the Judge and a jury, was for trespass by the defendants over certain lands of the plaintiffs, part of an estate called Diptwell, and for an injunction. The defendants justified the trespass under a claim of an easement of a right of way over the land in question to land in their occupation known as Gullamores.

The questions left to the jury were—first, whether the defendants and their predecessors had enjoyed the easement, and for what period; secondly, if they had enjoyed it, whether such enjoyment was by licence or of right. The jury found, first, that the defendants and their predecessors had used the way for sixty years; but, secondly, that there was no evidence to shew whether it was by licence or as a matter of right.

The Judge on these findings entered a verdict for the defendants.

Symons v. *Leaker.*

The Case set out the following facts:—

The female plaintiff was owner in fee of land over which the alleged trespass took place.

In the year 1828 both the dominant and servient tenements were vested in the Rev. John White in fee. By an indenture in that year, on the marriage of his son Mathew, he conveyed the Diptwell estate (the servient tenement) to trustees for the use of his son for life, remainder to the use of his son's wife, Susannah White, for life, remainder to the use of the children of the marriage. Susannah White died in 1836, leaving one child, the female plaintiff. Mathew White died in 1883, and the plaintiff then became entitled to the Diptwell estate in fee.

The Rev. John White subsequently by his will devised certain lands, and among them the land known as Gullamores, to his son, the Rev. J. White, with remainders over. And the land known as Gullamores was at the date of the alleged trespass in the occupation of the defendants.

It was contended, *inter alia*, that the enjoyment of the easement from 1828 to 1884 established the right in the occupier of the dominant tenement.

The Judge held that the enjoyment from 1828 to 1884 conferred no right in respect of the dominant tenement under the Prescription Act, inasmuch as from 1828 to April, 1883, the servient tenement was vested in a tenant for life, and that in the computation of time such period must be excluded.

The question for the Court was whether the computation of time under the Prescription Act, section 8, the period during which the servient estate was vested in a tenant for life, is to be excluded or included.

E. W. Byrne (with him *H. D. Bonsey*), for the appellants.—The question turns on the meaning of the word "reversion" in section 8 of the Prescription Act (2 & 3 Will. 4. c. 71) (1). We contend that the word must be read in its strict legal sense, and that it does not include "remainder." The interest of the plaintiff in the present case was in "remainder" and not in "reversion."

The distinction between "remainder" and "reversion" is pointed out in *Joshua Williams's Principles of Real Property*, 8th ed. p. 231. In an Act of so technical a character the Legislature must be taken to have employed legal phraseology in its strict technical sense.

In *Laird* v. *Briggs* (2), in the Court below, Fry, J., no doubt decided against this contention; but on appeal (3) the Court, although they did not decide the point, expressed strong opinions in favour of the strict rendering of the word "reversion." [Here the learned counsel read the extracts from the judgment of Jessel, M.R., and Cotton, L.J., set out in the judgment of Field, J., below.]

G. Pitt-Lewis, for the respondents.—There is no reason why the Legislature should have made a distinction between the remainderman and the reversioner. The Act is admittedly carelessly framed as regards draftsmanship. In the second volume of *Sheppard's Touchstone* the two terms "reversion" and "remainder" are treated as in some measure convertible.

Byrne, in reply.—The passage in *Sheppard's Touchstone* is with reference simply to the construction of deeds, and is cer-

(1) Prescription Act (2 & 3 Will. 4. c. 71), s. 7: "Provided also, that the time during which any person otherwise capable of resisting any claim to any of the matters before mentioned shall have been or shall be an infant, idiot, *non compos mentis*, *feme covert*, or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted, until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods hereinbefore mentioned, except only in the cases where the right or claim is hereby declared to be absolute and indefeasible."

Section 8: "Provided always, and be it further enacted, that when any land or water, upon, over, or from which any such way or other convenient watercourse or use of water shall have been or shall be enjoyed or derived, hath been or shall be held under or by virtue of any term of life or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way or other matter as herein last before mentioned during the continuance of such term shall be excluded in the computation of the said period of forty years, in case the claim shall within three years next after the end or sooner determination of such term be resisted by any person entitled to any reversion expectant on the determination thereof."

(2) 50 Law J. Rep. Chanc. 260.

(3) Law Rep. 19 Ch. D. 22.

tainly no authority that the terms are really convertible. As a matter of technical phraseology they are perfectly distinct.

Cur. adv. vult.

FIELD, J.—This is a Case stated on appeal by the County Court Judge of Devonshire. The action is by a Mr. Symons and wife for damages for trespass on the plaintiffs' land, tried before the Judge and a jury. The trespass was admitted, and was justified by the defendants under a claim of a right of way on the land in question to reach a field in their occupation called Gullamores.

The facts stated by the learned Judge are these: [Here his Lordship read the portions of the Case set out above.]

Now the question which has been argued before us turns on the construction of the Prescription Act (2 & 3 Will. 4. c. 71). The first section of importance with regard to this question is the 2nd. Nothing turns on the first part of it. Then the section goes on: "and where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing." Now in the case before us the way has been enjoyed for the full period of forty years, and this section would give an indefeasible title, but for sections 7 and 8 (1), to which it is necessary to refer. [His Lordship here read sections 7 and 8.]

In the present case I assume the action was brought or the alleged trespass resisted within the three years mentioned in section 8. But the point made against the plaintiffs is that they are not persons who can under that section resist the claim, and that question turns on the language of the Act, "person entitled to any reversion." Mr. Byrne, who argued this case very clearly, says that the female plaintiff here is entitled only to a "remainder," and not a "reversion": and this is doubtless true. Mr. Pitt-Lewis contends that it is not probable and that no good reason can be suggested why the Legislature should intend to place a person entitled in remainder in a worse position than a person entitled in reversion, and asks us to interpret the word "reversion" as referring to any estate falling into possession after the termination of the particular estate, and calls attention to the fact that this 8th section is admittedly, in part, carelessly drafted. No doubt there has been some error in framing the earlier part of the section; but the language of the part of the section we are now considering is clear—"a person entitled to any reversion"—and we are not at liberty to draw any inference from the manner in which the earlier part of the section may be framed; we must apply here the same rules of construction as in the case of other Acts of Parliament—namely, that the natural and received meaning of the words must be considered. It is a rule of construction that where words have a defined legal meaning, then that legal meaning is to be given to them, unless to do so would involve a contradiction in terms. As Lord Redesdale says in his judgment in *Jesson and others* v. *Wright and others* (4), "It is dangerous where words have a fixed legal effect to suffer them to be controlled without some clear expression or necessary implication."

Now, "reversion" is a well known word. Mr. Byrne has referred us to *Joshua Williams on Real Property*, where the difference is well pointed out:—

"If a tenant in fee-simple should grant to another person a lease for a term of years, or for life, or even if he should grant an estate tail, it is evident that he will not thereby dispose of all his interest, for in each case his grantee has a less estate than himself. Accordingly, on the expiration of the term of years or on the decease of donee in tail without having barred his estate tail and without issue, the remaining interest of the tenant in fee will revert to himself or his heirs, and he or his heir will again become tenant in fee-simple in possession. The smaller estate which he has so granted is called, during its continuance, the particular estate, being only a part, or particula, of the estate in fee.

"And during the continuance of such particular estate, the interest of the tenant

(4) 2 Bligh, 56.

in fee-simple which still remains undisposed of—that is, his present estate, in virtue of which he is to have again the possession at some future time—is called his reversion.

"If at the same time with the grant of the particular estate he should also dispose of this remaining interest or reversion, or any part thereof, to some other person, it then changes its name, and is termed not a reversion, but a remainder."

The mode of their creation is not the only difference. A reversion is something undisposed of, and a tenure is created between the reversion and the particular estate which does not exist in the case of a remainder. That being so, and "reversion" having a well-ascertained meaning, I must, unless there is good reason to the contrary, give that meaning to it.

In *Laird* v. *Briggs* (3) the late Master of the Rolls (at p. 34) says, with regard to this section, "The whole of the section and the whole of the Act is of a strictly technical character from beginning to end. As far as I can see, technical words are used in their proper technical senses. The nature of the rights defined and the nature of the remedies given are all technical, and *prima facie* it appears to me that the rule applies that technical words must have their technical meaning given to them unless you can find something in the context to overrule them. Now the words here are 'term of life or term of years,' and 'reversion expectant upon the determination thereof' is the exact legal description of it. A reversion in law is not a remainder, the difference being that a reversion is what is left, and the remainder is that which is created by the grant after the existing possession. I am not prepared to say there is anything in the nature of the case or in the context which would allow me to alter the meaning of 'reversion.'"

I am unable myself to see any reason why a remainderman should not have the same advantages in this matter as a reversioner; but I see that Lord Justice Cotton, in this case of *Laird* v. *Briggs* (3), entertains a different view. He says in his judgment (at p. 37): "All I say is that it will be well worthy of consideration, when the point comes to be judicially decided, whether the term 'reversion'—having regard to the fact that the section applies only where land is held for terms of lives or terms of years exceeding three years—is not to be considered and dealt with in the strict sense of a reversion expectant upon the grant of the terms mentioned." I do not, of course, quote these opinions of the learned Judges as an authority binding on me, but as *dicta* entitled to great weight, because, independently of them, I take the same view of the section. In my opinion there should be judgment for the defendants.

MANISTY, J.—I have come to the same conclusion. I will not go over the grounds again, but will merely add one or two additional observations which occur to me as reasons for the decision we have arrived at.

One is of great weight—namely, the general object which the statutes had in view, which seems to have been to clothe with a legal right the enjoyment in the case of rights of common sixty years, and in case of rights of way forty years, except in the particular cases specified in section 7. [Here his Lordship read the section.] Now the general object of the statute being to clothe with legal rights this enjoyment, I can well understand the reason for drawing a distinction between remainder and reversion.

Again, I cannot believe that in an Act so highly technical in its character, and drawn by experienced lawyers, they could have used the term "reversion" in mistake for "remainder." In the case of terms so well defined such a mistake is difficult indeed to understand. Nothing could have been easier than to have said "reversion or remainder."

Judgment for plaintiffs. Leave given to appeal.

Solicitors—Poole & Co., agents for Edmonds & Son, Totnes, Devonshire, for respondents; Harris, Powell & Sieveking, agents for H. M. Firth, Ashburton, for appellants.

[IN THE COURT OF APPEAL.]

1885. April 15, 16, 17. CARSON *v.* PICKERSGILL.*

Practice—Taxation of Costs—Party litigating as a Pauper—Allowance of Costs to, when successful—Rules of Court, 1883, *Order XVI. rules* 24 *to* 31; *Order LXV.*

A party who is admitted to sue or defend as a pauper is entitled, if successful after trial with a jury, no special order having been made by the Court or Judge, to be allowed on taxation such costs as he has become liable to pay. He will therefore be allowed his solicitor's costs out of pocket, but not counsel's fees or solicitor's profits.

Appeal by the plaintiff from the refusal of the Queen's Bench Division to order a review of the taxation of his bill of costs.

The case is reported *ante*, p. 312.

The plaintiff, who had been admitted to sue as a pauper pursuant to the Rules of Court, 1883, Order XVI. rule 22, recovered 50*l.* in an action for personal damages after trial before a Judge and a jury. The Judge gave judgment for that sum and costs, stating that he made no special order in favour of the plaintiff, but that he gave the plaintiff such benefit as the Rules of Court gave him. The Master taxed the plaintiff's bill of costs on the principle of allowing him general costs down to the date of his being admitted to sue as a pauper, but after that allowed him only costs out of pocket.

The plaintiff claimed to be allowed fees to counsel and solicitor's renumeration; he accordingly delivered objections to the taxation, and applied for an order to review the taxation; but this application was refused both by the Judge at chambers and by the Queen's Bench Division.

The plaintiff appealed.

J. L. Walton, for the appellant.—The question is, whether a pauper litigant who succeeds is entitled to the ordinary costs of litigation or is merely limited to costs out of pocket. If entitled to costs upon the assumption that he is an ordinary litigant they would include counsel's fees and the solicitor's costs.

[BRETT, M.R.—There is no contract by the plaintiff to pay the solicitor's costs; and can the solicitor who is assigned under Order XVI. rule 27 (1) consistently with his duty accept costs?]

The provisions of rule 27 are qualified. Moreover, it was formerly held that a pauper was dispaupered by the fact of obtaining a verdict in his favour—*Gougenheim* v. *Lane* (2). Order XVI. rule 31 is identical in its terms with rule 5 of Order XL. of the Consolidated Orders, 1860, with the exception of the word "Dives" being omitted. That alteration was not intended to alter the practice of the Court of Chancery under which the plaintiff would have been entitled to all the costs. The present rules must be construed with reference to the former Chancery practice. A restriction is placed upon fees being taken from a pauper, but it was never intended to prevent fees being paid by the opponent. Rule 31 of Order XVI. (1) was only intended to give a pauper ordinary costs, unless the Judge in the exercise of his discretion deprived him of such costs on the ground that the action

* *Coram*, Brett, M.R., and Bowen, L.J.

(1) Rules of Court, 1883, Order XVI. rule 24: "No person shall be permitted to sue as a pauper unless the case laid before counsel for his opinion, and his opinion thereon, with an affidavit of the party or his solicitor that the case contains a full and true statement of all the material facts to the best of his knowledge and belief, shall be produced before the Court or Judge or proper officer to whom the application is made, and no fee shall be payable by a pauper to his counsel or solicitor."

Rule 25: "A person admitted to sue or defend as a pauper shall not be liable to any Court fee."

Rule 27: "Whilst a person sues or defends as a pauper, no person shall take, or agree to take, or seek to obtain from him, any fee, profit, or reward for the conduct of his business in the Court, and any person who takes, or agrees to take, or seeks to obtain any such fee, profit, or reward, shall be guilty of a contempt of Court."

Rule 31: "Costs ordered to be paid to a person admitted to sue or defend as a pauper shall, unless the Court or a Judge shall otherwise direct, be taxed as in other cases."

(2) 4 Dowl. 482.

had been improperly or improvidently brought, or unless they were dealt with in some special way. With regard to the Chancery practice he referred to 11 Hen. 7. c. 12; 23 Hen. 8. c. 15; *Chitty's Statutes*, vol. iv. p. 1223, 4th ed.; *Beames on Costs*, pp. 77 and 118; *Scatchmer* v. *Foulkard* (3), *Wallop* v. *Warburton* (4), *Daniell's Chancery Practice*, p. 90, and *Blackstone's Commentaries*, vol. iii. p. 400, ed. of 1825.

The cases of *Rice* v. *Brown* (5) and *Rattray* v. *George* (6) also shew that the practice of the Courts of common law and Chancery was, until 1853, to allow costs to be paid to the pauper although the pauper as such could never pay costs. The object of rule 121 of Reg. Gen. H. T. Jan. 1853, and of rule 28 of Reg. Gen. H. T. Feb. 1853 was to get rid of an abuse which had grown up of allowing a pauper costs whenever he succeeded in obtaining a verdict. *Dooly* v. *The Great Northern Railway Company* (7) is only an authority upon the construction of that rule which has been annulled, and consequently the decision is no longer an authority. Under the Judicature Acts the Court has the same jurisdiction over costs which the Court of Chancery formerly had—*Garnet* v. *Bradley* (8). The clear reading of Order XVI. is that the Chancery practice is to prevail.

[BRETT, M.R., referred to *Wellesley* v. *Wellesley* (9).]

There is nothing in rule 31 of Order XVI. to restrict the use of the word "costs," which includes all payments made to legal agents. He also cited Order XVI. rule 27; Consolidated Order LX. rule 7.

Manisty, for the respondent.—The question must be decided upon the Rules of 1883, Order XVI. (1): for 11 Hen. 7. c. 12, 23 Hen. 8. c. 15, and the Rules of Hilary and Trinity Terms, 1853, are repealed, and the position of a litigant *in forma pauperis* is now the same as it was at common law. *Dooly* v. *The Great Northern Railway Company* (7) shews that such a litigant is not entitled to the costs which the plaintiff here claims to have allowed to him. The practice in the Court of Chancery was no doubt somewhat different, as is shewn by the judgment in *Rubery* v. *Morris* (10), shortly after which Order XL. rule 5 of the Consolidated Orders was promulgated. That order uses the phrase "Dives' costs," but that phrase does not appear in the Rules of 1883, as would have been the case had it been intended to perpetuate the old Chancery practice and to apply it to the High Court. This case was tried by a jury, and therefore the costs must, in the absence of any order, follow the event. There is in such a case no order for costs, for they follow the event, and therefore the costs claimed by the plaintiff are not "costs ordered to be paid" within Order XVI. rule 1. The plaintiff is entitled to be allowed costs out of pocket, but not costs which he has not paid and which he is not liable to pay. The Statute of Gloucester (6 Edw. 1. c. 1) is repealed by the conjoint effect of 42 & 43 Vict. c. 59, schedule, part II., and 46 & 47 Vict. c. 49. s. 4.

Cur. adv. vult.

BRETT, M.R. (on April 17).—In this case the plaintiff sued the defendant, and succeeded in his action after a trial before a Judge and a jury. The plaintiff sued *in forma pauperis*, and his solicitor carried in his bill of costs for taxation, having claimed in this bill to be allowed the same costs as would have been incurred had the plaintiff not sued *in forma pauperis*. The defendant objected to this claim, and urged that the plaintiff was not entitled to have such costs allowed on taxation.

The question thus raised is both curious and abstruse, and I have made enquiries in all likely quarters in order to ascertain the principles upon which it ought to be answered, but I have not been able to find that any one possesses a very clear notion upon the subject.

When a suitor appears *in forma pauperis*,

(3) 1 Eq. Ca. Abr. 125.
(4) 2 Cox's Eq. Cas. 411.
(5) 1 Bos. & P. 39.
(6) 16 Ves. 232.
(7) 4 E. & B. 341; 24 Law J. Rep. Q.B. 25.
(8) 48 Law J. Rep. Exch. 186; Law Rep. 3 App. Cas. 944.
(9) 1 De Gex, M. & G. 501;
(10) 1 Mac. & G. 413.

the Court may appoint a counsel and a solicitor, who act for him; the counsel so appointed does not receive any honorarium, for there was a statute which forbade him to accept any honorarium, and the solicitor, who was appointed by the Court and not retained by the party, could not recover anything from his client. The statute which applied to the Courts of common law was 11 Hen. 7. c. 12; but in spite of that statute a practice grew up in the Courts of law which it must be said did in fact override the provisions of that statute. That practice was, that if a plaintiff who sued *in forma pauperis* succeeded (I speak of the plaintiff, as that was the usual case), he was allowed to pay his counsel and solicitor as though they had been retained by him in the usual way. This practice having grown up, the question came before the full Court of Queen's Bench in the case of *Dooly* v. *The Great Northern Railway Company* (7), and the Court then pointed out that the practice was opposed to the statute, that it contradicted the rule of Court, and it was then shewn by irresistible arguments that the idea embodied in the practice was, independently of the statute and the rules, contrary to the ethical rules of right and wrong. That case, therefore, established that when a party who sued *in forma pauperis* was successful, the defeated party was bound to pay such costs as the successful party was liable to pay, and had paid, or had become liable to pay, and that such costs were to be costs which it was reasonable as between himself and the other party that he should incur. The defeated party was not to be liable to pay any costs which the successful party had incurred unnecessarily through over-anxiety or nervousness. In the case of a successful suitor who sued *in forma pauperis*, the defeated party was not liable to pay counsel's fees or solicitor's costs, for, as the Judges said, that would be to allow the successful party to make gifts to his counsel and his solicitor out of another person's pocket. They anathematised that practice and restored the practice in the common law Courts to that which had originally prevailed, and that was, that where a pauper suitor succeeded, it was right that his solicitor should be repaid by him certain expenses without the payment of which the suit could not have proceeded—that is to say, that the solicitor should be repaid moneys out of pocket.

But a different view appears to have prevailed in the Court of Chancery. The statute of Hen. 7 and the Rules of Hilary and Trinity Terms, 1853, did not apply to the Court of Chancery, and it appears from what Lord Eldon said in *Rattray* v. *George* (6) that the Court of Chancery would in this matter do what it thought right, fair, and just, and that as the unsuccessful party would gain an advantage by having an adversary who sued *in forma pauperis*, unless he had to pay costs as though the other party were not so suing, the Court did allow those fees to counsel and those profits to the solicitor which the suitor would be liable to pay if he were not suing *in forma pauperis*. To this allowance of costs the Court of Chancery gave the nickname of "Dives' costs," but I have not been able to learn what exactly that phrase did cover. It is certain that when "Dives' costs" were allowed, no counsel's fee would be allowed unless there was a voucher that it had been paid, and it is clear that it could not even have been marked till after the suit had been heard; but when so marked and paid it was, it would seem, allowed, and in like manner the costs of the solicitor were allowed as though he had been retained. This rule does not of course infringe on the statute or general rules, for they did not apply to the Court of Chancery, but it certainly shewed that the Court of Chancery did not take the same view as the Court of Queen's Bench of what was ethically right and wrong between the parties. This being so, I think that when the Rules of Court of 1883 were made, the framers of those rules would adopt that rule or practice which would seem to them the most right and just; and, looking at the uncertainty of the law, at the fact that when the suitor *in forma pauperis* was (as I have said was most often the case) the plaintiff, then the defendant was forced into Court by him, and that in such case the defendant was to pay if he failed, and to get nothing if he succeeded, I am of opinion that there is no answer to the doctrine laid down in *Dooly* v. *The Great*

Northern Railway Company (7), and that the Chancery practice cannot be supported.

Order XL. of the Chancery Consolidated Orders adopted the phrase "Dives' costs"; but that phrase does not appear in the Rules of 1883, for Order XVI. rule 27 is as follows: "Whilst a person sues or defends as a pauper, no person shall take, or agree to take, or seek to obtain from him any fee, profit, or reward for the conduct of his business in the Court, and any person who takes, or agrees to take, or seeks to obtain any such fee, profit, or reward, shall be guilty of a contempt of Court."

It is suggested that this rule only applies during the currency of the cause; but I am of opinion that it means that no payment is to be taken for anything that is done while a person sues or defends as a pauper. The words at the beginning of the rule are placed there because money might come to a person suing or defending as a pauper, and then, upon application, the order admitting the person to so sue or defend might be rescinded. Rule 31 omits the phrase "Dives' costs," and states that "costs ordered to be paid to a person admitted to sue or defend as a pauper shall, unless the Court or a Judge shall otherwise direct, be taxed as in other cases." Some costs, therefore, may be allowed to a pauper —that is, such costs as may be ordered to be paid. Where a cause is tried with a jury, the costs, by Order LXV., follow the event, unless other order is made; if the case is tried in the Queen's Bench Division without a jury, the costs are in the discretion of the Judge, so that he must make some order; and in the Chancery Division, the costs being in the discretion of the Judge, he must also deal with them by order. Now the rule in ordinary cases is that the unsuccessful party pays to the successful party those costs which the successful party was reasonably entitled to incur, which he has paid or is liable and bound to pay. Applying that to a person admitted to sue or defend *in forma pauperis*, it appears that such a person is only entitled to receive as costs that which he has paid or which he is liable to pay. He is, however, not liable to pay his counsel's fee even to the solicitor, for no fee is marked upon the brief in the case of a suit *in forma pauperis*; and if after the suit was over the person suing or defending *in forma pauperis* were allowed to mark a fee upon the brief, and to recover it from his adversary, that would be, in fact, to allow him to make a present out of another person's pocket. With regard to the solicitor's fees, the case stands thus: A solicitor is allowed when he is retained to recover the ordinary profits of his profession. But in the case of a pauper suit there is no retainer, and in such a case the solicitor cannot sue on the usual express or implied contract between himself and his client, because there is no contract; but in such a case the solicitor is of necessity put to expense, and it would be unjust to say that he is not, in a case in which he is successful, to recover those costs as to which he is out of pocket. Costs out of pocket do not mean only cash out of pocket, for, as we said recently in this Court in the case of *The London Scottish Benefit Society* v. *Chorley* (11), the phrase covers more than that: it covers things which, though not actually money out of pocket, yet represent money's worth; for in the conduct of such a suit the solicitor will employ his clerks about the proceedings in the suit, and their time will be occupied on those matters when but for that suit it could be devoted to other matters; so that such items as that are included in the phrase "costs out of pocket." There are also the expenses of witnesses—such items as these are cash out of pocket; but the employment of clerks are costs out of pocket. The solicitor is not to have the profits of his profession, but he is to have his costs out of pocket. This is the principle which ought to be applied to the taxation of this bill, and if it has not been applied, the taxation ought to be reconsidered; but the objections made by the plaintiff to the taxation fail, so that the appeal must be dismissed.

BOWEN, L.J.—Costs are not recoverable at common law, but are the creation of statute, and the question here, which is somewhat obscure, arises from the admission of persons to sue or defend *in forma pauperis*. The statute of 11 Hen. 7. c. 12 enacts that "every poor person

(11) 53 Law J. Rep. Q.B. 551; Law Rep. 18 Q.B. D. 872.

. . . . shall have . . . . writ or writs original and writs of subpœna according to the nature of their causes, therefor paying nothing to your Highness for the seals of the same, nor to any person for the writing of the same writ and writs; . . . and that the Lord Chancellor shall assign . . . . learned counsel and attorneys for the same without any reward taking thereof; and . . . . the Justices shall assign to the same poor person or persons counsel learned by their discretion, which shall give their counsel, nothing taking for the same; and likewise the Justices shall appoint attorney and attorneys for the same poor person or persons, and all other officers requisite, . . . which shall do their duties without any reward for their counsel, help, and business in the same."

Notwithstanding the statute, however, a practice grew up at common law of holding that where a plaintiff recovered a substantial sum, that had the effect of dispauperising him, and the judgment was held to have a retrospective effect on the conduct of the cause so as to enable the pauper suitor to pay his counsel and solicitor, and then to recover those payments, which were in fact donations, from his adversary. That practice lasted until 1853, as may be seen on reference to the case of *Dooly* v. *The Great Northern Railway Company* (7), where Lord Campbell said: "The statute of Gloucester gave the plaintiff recovering damages the costs of his writ, and that has always been construed as including all the costs expended in consequence of the defence by the defendant. Then has not this plaintiff been allowed all that she has paid or become liable to pay in consequence of the defence? How can it be said that she was liable either at law or in honour to pay those rewards which the statute 11 Hen. 7. c. 12 expressly (and I think most judiciously) says shall not be paid. A practice to the contrary had grown up. I agree with my brother Erle that it was contrary to law." Mr. Justice Wightman in the same case said: "But there had been decisions not reconcilable with the Act nor with each other; and a practice had obtained by which, when the plaintiff suing *in forma pauperis* recovered more than 5*l.*, he did pay fees both in Court and to counsel and to attorneys; and though when he recovered less than 5*l.* he was allowed on taxation only costs out of pocket, when he recovered more he was allowed those fees so paid."

At this practice the general rules of Hilary and Trinity Terms of 1853 were levelled. Rule 121 of Hilary Term provided that "no fees shall be payable by a pauper to his counsel and attorney . . . by reason of a verdict being found for such pauper exceeding 5*l.*;" and rule 28 of the Rules of Trinity Term provided that "a person admitted to sue *in forma pauperis* shall not in any case be entitled to costs from the opposite party, unless by order of the Court or a Judge;" and after these rules were passed the practice in the common law Courts became settled.

In the Court of Chancery the costs were in the discretion of the Court, and that Court also allowed persons to sue *in forma pauperis*; and although the statute of Hen. 7 did not apply to the Court of Chancery, that Court, by analogy, adopted its provisions with a qualification—that is, it adopted them as far as it thought they satisfied the requirements of justice. In *Scatchmer* v. *Foulkard* (3) Lord Somers ordered a pauper "his costs like other suitors, for, though he is at no costs, or but small costs, yet the counsel and clerks do not give their labour to the defendant, but to the pauper." Thus came into use the phrase "Dives' costs," which certainly established a principle differing from that which the common law recognised, and it came to be held in Chancery that the unsuccessful party ought not to pay less because his adversary happened to be suing *in forma pauperis*. That principle was asserted in *Wallop* v. *Warburton* (4) and in *Rattray* v. *George* (6); and in *Rubery* v. *Morris* (10) Lord Cottenham discusses the question, and says that it appears to him "to be most consistent with principle and most reconcilable with the weight of authority to hold that any party asserting an unfounded claim by bill, or resisting a well-founded claim by answer, should not profit by the poverty of his opponent, but should, upon failure, pay the ordinary costs of the litigation;" and he then states that he will consider whether there shall be a general order made. Following upon that decision we find that Order XL. rule 5

was made on the 10th of December, 1849, the judgment in *Rubery* v. *Morris* (10) having been given on the 9th of November, 1849, and that Order provides that "where costs are ordered to be paid to a party suing or defending *in forma pauperis*, such costs shall be taxed as Dives' costs unless the Court shall otherwise direct."

These two views, therefore, were in existence and in conflict until the passing of the Judicature Act. Before that Act the Judge had not at common law the same discretion in the matter of costs as the Court of Chancery and its Judges had. The consolidated orders of the Courts of Chancery adopted in the Consolidated Order XL. the phrase "Dives' costs"; and it seems, on referring to the judgment of Lord Cottenham in *Rubery* v. *Morris* (10), which, as I have said, shortly preceded the issuing of that Order, that the phrase means costs covering those payments which the pauper suitor did in fact make, including counsel's fees and the solicitor's bill—that is, as I have said already, covering donations made by the pauper suitor.

In this case the action was tried before a jury, and, as a result of Order LXV., there was no need of any special order unless the Judge chose, for they follow the event. I am inclined to doubt whether rule 31 of Order XVI. applies at all to such costs; I doubt whether it introduces a new doctrine into the common law taxations; but I will assume that it does apply to this case, and that the judgment in such a case as this is equivalent to an order. These rules of Court constitute a new fountain of practice. The statute of Gloucester is gone, the statutes of Hen. 7 and Hen. 8 are repealed, and I do not think that rule 31 recognises in such a case as this the payment by the suitor *in forma pauperis* of fees to counsel or of his solicitor's bill, for rules 24 and 27 of the same Order emphatically prohibit any such payment. Rule 31, though apparently framed upon the Consolidated Order of the Court of Chancery, omits the phrase "Dives' costs," and I think that it means that the costs are to be taxed on the principles on which costs are taxed in ordinary cases, and that a pauper suitor is not to be allowed any costs which he has not paid or which he is liable to pay. If the plaintiff is held to his objection to the taxation, he does not bring himself in any view of rule 31, for he has not paid these costs which he claims to have allowed to him; but, apart from that, it appears to me that this appeal must fail, for the reasons which I have expressed.

Appeal dismissed.

Solicitors—J. E. & H. Scott, agents for Graham & Shepherd, Sunderland, for appellant; Hickin & Graham, agents for Ralph Simey, Sunderland, for respondent.

[IN THE COURT OF APPEAL.]

1885. June 10. } TURNBULL *v.* FORMAN.*

Husband and Wife—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-s.* 4—*Promissory Note—Contract made before passing of Act—Separate Property—Restraint on Anticipation.*

Sub-section 4 *of section* 1 *of the Married Women's Property Act*, 1882, *which affects the rights of parties is not retrospective, and therefore a judgment obtained in an action brought after the passing of the Act against a married woman on a promissory note made before the passing of the Act can only be enforced against so much of her separate estate as, free from restraint on anticipation, would have been liable before the passing of the Act.*

Conolan *v.* Leyland (54 Law J. Rep. Chanc. 123) *approved.*

Bursill *v.* Tanner (Law Rep. 13 Q.B. D. 691) *questioned.*

Appeal by the defendant from a decision of Mathew, J.

The action was brought against the defendant, a married woman, on a joint and several promissory note made by her and her husband.

The property of the defendant was settled to her separate use for life without power of anticipation under a settlement executed in 1870 in anticipation of her intended marriage. The promissory note

* *Coram* Brett, M.R., Baggallay, L.J., and Bowen, L.J.

in question was made in 1879, and the writ in the action was issued on the 30th of April, 1885. A Master made an order under Order XIV. rule 1, which, so far as material, was in the following terms:—

"It is ordered that the plaintiff be at liberty to sign final judgment in this action for the amount indorsed on the writ, with interest, if any, and costs to be taxed, but that the execution thereon be limited to the separate estate of the defendant not subject to any restraint against anticipation, unless by reason of section 19 of the Married Women's Property Act, 1882, the property shall be liable to such execution notwithstanding such restraint. And it is further ordered and declared that any separate estate of the above named defendant not subject to any restraint against anticipation, unless by reason of section 19 of the Married Women's Property Act, 1882, the property shall be liable to such execution notwithstanding such restraint, to which the said defendant is at this present date entitled, is chargeable with the payment to the plaintiff of the amount endorsed on the writ, with interest, if any, and costs.

"And it is further ordered that an enquiry be had before one of the Masters whether the said defendant has now any and what separate estate, and of what it consists, and from what it has arisen, and in whom the same is vested, and whether the same is in any and what manner, and to any and what extent, subject to any restraint against anticipation, or is charged or liable to the payment of any and what debts or charges.

Mathew, J., on appeal, affirmed this order, and taking into consideration a supposed conflict between the decisions in *Bursill* v. *Tanner* (1) and *Conolan* v. *Leyland* (2), gave the defendant leave to appeal direct to the Court of Appeal.

Cozens-Hardy, Q.C., and *Channell*, for the defendant.—The question is whether an order in the present form can be made, or whether it should not follow the decision in *Pike* v. *Fitzgibbon* (3), where it was held that it might be made against so much of the settled estate to which the married woman was entitled free from restraint on anticipation at the time when the contract was made as remains at the time when judgment is obtained against her. Apart from authority, sub-section 4 of section 1 of the Married Women's Property Act, 1882 (4), is not retrospective. The language of the sub-section has reference to the future. The saving clause is section 19. In *Bursill* v. *Tanner* (1) the facts raised the present point, but it was there assumed that the sub-section applied to any contract made before the passing of the Act. Chitty, J., however, in *Conolan* v. *Leyland* (2) held that sub-sections 3 and 4 taken together are not retrospective. The rule as to the construction of the sub-section is the same as that which was applied to the construction of a will in *In re March*; *Mander* v. *Harris* (5). Therefore the law applicable at the date when the promissory note was made must be looked at in order to see how much of the married woman's separate estate would be bound.

R. Wallace, for the plaintiff.—The point now raised came before the Court for decision in *Bursill* v. *Tanner* (1). It has been held in *Weldon* v. *Winslow* (6), where the question was raised whether the damages recovered in an action of tort by a married woman are her own property or not, that sub-section 2 of section 1 so far as procedure is concerned is retrospective. The words of that sub-section are grammatically capable of a retrospective construction, and apply both to torts and to contracts; and the damages recovered for

(1) Law Rep. 13 Q.B. D. 691.

(2) 54 Law J. Rep. Chanc. 123; Law Rep. 27 Ch. D. 632.

(3) 50 Law J. Rep. Chanc. 394; Law Rep. 17 Ch. D. 454.

(4) 45 & 46 Vict. c. 75. s. 1, sub-s. 3: "Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shewn."

Sub-s. 4: "Every contract entered into by a married woman with respect to and to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire."

(5) 54 Law J. Rep. Chanc. 143; Law Rep. 27 Ch. D. 166.

(6) 53 Law J. Rep. Q.B. 528; Law Rep. 13 Q.B. D. 784.

breach of contract are to be the separate property of the married woman. The use of the word "thereafter" instead of "hereafter" in sub-section 4 shews it was intended that the sub-section should be retrospective.

BRETT, M.R.—It seems to me that there is an old and well-known rule with regard to the construction of a statute affecting rights which is always applied where the words are doubtful. The rule which was applied in the case of *In re March; Mander* v. *Harris* (5) is that unless the words of a statute which affects rights are clear to the contrary from either the grammatical construction or the necessary context, the statute is to be construed prospectively, and so as not to affect rights which were acquired before the statute was passed. Sub-section 4 of section 1 of the Married Women's Property Act, 1882, clearly affects rights. It gives a greater right to the person in whose favour a contract like the present one is made against a married woman than he had before the statute was passed. The case of *Pike* v. *Fitzgibbon* (3) decided that he had only a limited right as against a married woman before the passing of the Act. But sub-section 4 extends that right in respect to a contract made with a married woman, and therefore, unless the words of the sub-section are clear to the contrary, they can only affect rights which came into existence after the statute was passed. It was said that the decision in *Weldon* v. *Winslow* (6) was contrary to such a view, and shews that the sub-section ought to be construed so as to affect a contract made before the passing of the statute; but the real ground of the decision in that case is that no right was affected or altered by the construction which was there placed upon sub-section 2 of section 1. It was there pointed out that as the action was in tort for a personal injury to the plaintiff before the statute was passed, she could have sued before the Act in her own name, and without her husband, subject only to a plea in abatement as to coverture. The husband was formerly joined only for the sake of conformity. It was also there said that sub-section 2 of section 1 only took away the right of any one to object that the husband had not been joined; but the right of the wife was not altered, nor the liability of the husband, and therefore it only affected procedure. An Act which deals not with rights, but with procedure which takes place after the passing of the Act, does not affect the procedure retrospectively but prospectively. It does not therefore signify if the cause of action arose before the passing of the Act if the procedure only is dealt with, and not the right which gives the cause of action. But that is a very different matter in sub-section 4, and the decision in *Weldon* v. *Winslow* (6), upon the application of the rule to sub-section 2, does not affect sub-section 4. I am of opinion the judgment given in *Conolan* v. *Leyland* (2) is correct; and if *Bursill* v. *Tanner* (1) is contrary to that decision, it cannot be supported.

BAGGALLAY, L.J.—I am of the same opinion. The substantial question is whether sub-section 4 of section 1 of the Married Women's Property Act, 1882, is retrospective. It was said that the decisions in *Bursill* v. *Tanner* (1) and *Conolan* v. *Leyland* (2) are apparently inconsistent. The first decision proceeded on the assumption that the sub-section was retrospective; but a different view was taken by Mr. Justice Chitty in *Conolan* v. *Leyland* (2). For the reasons stated by the Master of the Rolls, I think the latter decision was correct, and the order must be amended to meet that view of the case. I do not know whether it is necessary to say more than that, having expressed my opinion as regards the statute not being retrospective as to the operation of sub-section 4. But as the matter may be carried further, all I desire now to say is that whenever the occasion arises I should desire to consider the whole effect of the decision in *Bursill* v. *Tanner* (1), for I entertain considerable doubt whether the decision pronounced in that case, or the order which was drawn up in accordance with it, can be supported.

BOWEN, L.J.—I am of the same opinion. This case must be decided by applying to sub-section 4 a well known

rule of construction. If the Legislature means to take away or lessen rights which parties have previously acquired, it is reasonable to expect that this would be done by clear words; or, to put it in another way, if the words are not unequivocally clear, the proper construction is that the Legislature did not intend to take away or lessen rights which have already been acquired. There is another rule of construction which is the converse of that — namely, that where procedure is being dealt with, the same presumption does not apply. It is not unreasonable to suppose that the Legislature, when dealing with procedure, intended to deal with past as well as present procedure; and it does not follow that a suitor has a vested right in any imperfect state of procedure. Bringing these two rules to bear upon sub-section 4 of section 1 of the Married Women's Property Act, 1882, it will be found that the words are not clear, for they may refer either to a contract entered into before or to one entered into after the passing of the Act; and consequently they affect rights which have already been acquired. If that be so, then, where the words of a statute are not clear, the presumption of law is that they are not to be construed so as to take away rights already acquired. The section must therefore be said only to affect rights acquired after the passing of the statute. This construction is the same as that put upon the section in the case of *In re March*; *Mander* v. *Harris* (5), and is not inconsistent with that put by this Court upon the same section but a different sub-section in *Weldon* v. *Winslow* (6). The rule rests upon a broad canon of construction which is nearly as old as the English law.

BRETT, M.R.—This case must not be taken as a precedent for passing by the Divisional Court and bringing an appeal direct to this Court.

Appeal allowed.

Solicitors—Caister & Shearman, agents for Paterson, Cameron & Co., Edinburgh, for plaintiff; T. White & Sons, for defendant.

[IN THE COURT OF APPEAL.]

1885. June 4. } HARRIS AND ANOTHER *v.* JACOBS, MARCUS AND COMPANY.*

Ship and Shipping—Demurrage—Charter-party — Construction — "Such ready quay berth as ordered by charterer"— Failure of Charterers to provide Quay Berth.

A charter-party contained a clause that the plaintiffs' ship should load a complete cargo at T. and then proceed to London or Tyne Dock "to such ready quay berth as ordered by charterers," and there deliver to the affreighters or assigns; demurrage to be at the rate of 30*l. per running day. On arrival of the ship at the Millwall Docks, London, a delay occurred by reason of there being no quay berth ready to receive her. She discharged part of the cargo into lighters, and the remainder when she got into a quay berth. The plaintiffs claimed a lien on the cargo in respect of such delay, and deposited the cargo with the dock company with notice not to deliver the same until payment of the amount claimed. The defendants, who were the owners of the cargo by virtue of certain delivery orders from the charterers or their assigns, claimed delivery of the cargo, and having paid to the company the amount claimed by the plaintiffs gave the company notice not to part with the same as they disputed the plaintiffs' lien:*—Held, *that the defendants were liable for the amount claimed, as the word "ready" was introduced into the charter-party for the protection of the plaintiffs, and that the defendants were in the same position as the charterers, who under the charter-party were bound to name a quay berth to receive the ship as soon as she was ready to proceed there.*

Appeal by the defendants from a judgment of Mathew, J., at the trial without a jury.

By a charter-party dated the 21st of June, 1883, and made between the plaintiffs, the owners of the steamer *Wimbledon*, and E. J. Hough & Co., it was agreed that the *Wimbledon* should proceed to Tripoli, and there load a complete cargo of esparto

* *Coram* Brett, M.R., Baggallay, L.J., and Lindley, L.J.

fibre in hydraulic pressed bales, and when so loaded should proceed to London or Tyne Dock "to such ready quay berth as ordered by charterers, and be always afloat," and, certain perils and casualties only excepted, "there to deliver the fibre to the affreighters or assigns," freight to be paid as in the charter-party mentioned. The charter-party also contained the following clauses:—"The cargo shall be brought to and taken from alongside the steamer at affreighters' risk and expense, and in accordance with custom of respective ports. Cargo to be delivered as fast as steamer can deliver, weather permitting, Sundays, bank holidays, Good Friday, and Christmas Day, accidents, excepted. Demurrage to be at the rate of 30*l.* per running day. In no case, unless in berth before noon, shall the lay-days count before the day following that on which the vessel is in berth at ports of loading and discharging ready to load or deliver, and notice thereof given in writing. All liability of charterers shall cease as soon as the cargo is shipped and advance (if any) paid, the captain or owners having an absolute lien on the cargo for all freight, dead freight, and demurrage in respect thereof. Penalty for non-performance proved amount of damages, but not exceeding amount of freight."

The *Wimbledon* accordingly proceeded to Tripoli, where Giovanni Cassar & Co. at Tripoli, on behalf of the charterers, shipped a cargo of 810 tons of fibre under a bill of lading dated the 31st of July, 1883, whereby the goods were made deliverable to Hough & Co. or their assigns, they paying freight on the goods and performing all other conditions as per charter-party.

The *Wimbledon* proceeded with the cargo to the Millwall Docks, London, as ordered by the charterers, where she arrived on the evening of the 13th of August, 1883. Some delay occurred by reason of all the ready quay berths being occupied, and she began to discharge her cargo into lighters, but finally completed the unloading in a quay berth. The plaintiffs alleged that a ready quay berth was not provided at the dock according to the charter-party; that they had incurred an expense of 60*l.* in respect of such delay, being at the rate of 30*l.* a day for such delay; and that they were ready to deliver the goods pursuant to the bill of lading on payment of the sum of 60*l.*; and as that amount was not paid, they proceeded to exercise their lien on the goods for the same.

The defendants, who were the owners of the goods, claimed delivery of the goods by virtue of delivery orders from Hough & Co. or their assigns under and by virtue of the bill of lading, and disputed the lien and the amount claimed.

The plaintiffs thereupon deposited the goods with the dock company as wharf or warehouse owners, and gave the company notice in writing that the goods were to remain subject to a lien for demurrage payable to the plaintiffs as shipowners to the amount mentioned in the notice.

The defendants in order to obtain delivery of the goods deposited the amount claimed with the dock company, and within fifteen days of such deposit being made gave the company notice in writing to retain it, as they did not admit any sum to be so payable.

The plaintiffs in the action claimed a declaration that they were entitled to their lien and to receive the sum deposited, and also that it might be paid over to them by the dock company.

At the trial Mathew, J., gave judgment for the plaintiffs for 30*l.*, the plaintiffs giving up their claim in respect of one of the days.

The defendants appealed.

Gully, *Q.C.*, and *Douglas Walker*, for the defendants.—The question is, whether under the terms of the charter-party this sum can be claimed as demurrage. There is no case which precisely decides when the lay-days are to begin to run. There was no delay in getting into a ready quay berth. The defendants are only liable if there is a lien. Each case must depend upon the particular words of each contract. The plaintiffs would not even as between themselves and the charterers have any cause of action, for the charterers have committed no breach. The contingency that the dock might be full is one which was in the contemplation of the parties, and would not give any cause of action

even if the delay was of such a kind as to be in the nature of demurrage. *Murphy* v. *Coffin* (1) is distinguishable from this case, because there the charter-party did not contain a clause that the ship was to proceed to a ready quay berth. The destination of the ship here is a ready quay berth, and the shipowners have not fulfilled their contract until she has got to such a berth. If it is the duty of the charterers to name a ready quay berth, the remedy of the shipowners is an action for damages for not doing so; but they cannot claim demurrage, in the proper sense of the word, until the lay-days have elapsed. *Nelson* v. *Dahl* (2) and *Sanguinetti* v. *The Pacific Steam Navigation Company* (3) were also referred to.

W. Baugh Allen and *J. A. Hamilton*, for the plaintiffs.—The very object of putting into the charter-party the words "ready quay berth" was to meet the point that the charterers undertook that there should be a quay berth ready when the ship arrived at her place of destination. *Murphy* v. *Coffin* (1) deals with the case where a ship is ordered to a particular tip or quay berth. The terminus of the voyage here was the Millwall Docks, London, and as soon as the ship arrived there she had performed her contract. The charterers undertook that a quay berth should be ready, and were in default in not naming one. As soon as the defendants began to take delivery they were estopped from saying the ship was not in berth and that the lay-days did not begin to run. The plaintiffs bound themselves to discharge the ship as fast as they could, and when once they shew delay has arisen it lies upon the defendants to shew that such delay was reasonable.

Gully, Q.C., in reply.—The words were put into the charter-party for the benefit of both parties, and not for that of the shipowners alone.

BRETT, M.R.—The question must be, whether as between the shipowners and the charterers the latter would be liable, and to what extent. The charter-party is an extremely difficult one to construe. Is the clause put into the charter-party in favour of the shipowners or not? It is in express terms—namely, when the ship is loaded she is to proceed "to such ready quay berth" as ordered by charterers. If the words had been "to such quay berth" they would have been in favour of the charterers, but as the word "ready" is put in it must be in favour of the shipowners. The meaning of the clause therefore is that the charterers would order the ship to such a dock and such a quay berth as would be most to their benefit, but that they undertook for the benefit of the shipowners that such quay berth should be ready. That being so, the charterers bound themselves to name a quay berth to receive the ship as soon as she was ready to proceed there. The ship would be ready to go into a quay berth as soon as she got into the Millwall Docks. Then there would be a default on the part of the charterers if a quay berth was not ready to receive her.

Demurrage is always the agreed damages to be paid for the delay of the ship by the default of the charterer either at the commencement or the end of the voyage. It may also arise at any intermediate port on any part of the voyage. Here there was a delay at the end of the voyage by the default of the charterers. That is not strictly demurrage, but is in the nature of demurrage. The clause in question, within its true meaning and construction, would comprise such damage for such a default, and if the default had been made by the charterers it would have been covered by the damage clause, and the shipowners would have been entitled to 30*l.* a day. The liability of the defendants, therefore, was here to be measured by the same liability as that of the charterers if they had been the defendants. The defendants are therefore liable, and the appeal must be dismissed.

BAGGALLAY, L.J.—I am of the same opinion. The word "ready" was introduced into the charter-party in order to protect the shipowners.

LINDLEY, L.J.—I am of the same opinion. As soon as one is satisfied that the

(1) Law Rep. 12 Q.B. D. 87.

(2) Law Rep. 12 Ch. D. 568, at pp. 583, 591; *in dom. proc.* 50 Law J. Rep. Chanc. 411; Law Rep. 6 App. Cas. 38.

(3) 46 Law J. Rep. Q.B. 105; Law Rep. 2 Q.B. D. 238, 249, 251.

word "ready" was put into the charter-party to protect the shipowners, the charterers are bound to provide a quay berth, or pay damages for not doing so.

Appeal dismissed.

Solicitors—Lyne & Holman, for appellants; Ingledew, Ince & Colt, for respondents.

[IN THE COURT OF APPEAL.]

1885. June 25. } THE LONDON AND YORKSHIRE BANK *v.* COOPER AND OTHERS.*

Practice — Inspection of Documents— Company—Documents in Possession of Liquidator after Dissolution—Action on Joint and Several Promissory Note made by Directors.

One of several defendants stated in his affidavit of documents that certain documents were in his possession or power, but that he had no property in them. The affidavit further stated that he objected to produce them, on the ground that he originally had the custody of them as the liquidator appointed in the winding-up of a company. The liquidation proceedings had come to an end, the company had been dissolved before the commencement of an action on a joint and several promissory note made by the defendants as directors of the company to secure repayment of any sums which might become due from the company to the plaintiffs:—Held, *that the plaintiffs were entitled to an order on the defendant to produce the documents for inspection, as he was a person who, being bound under section* 155 *of the Companies Act*, 1862, *to keep the same for a period of five years from the date of the dissolution of the company, had an absolute control over them.*

Appeal from a decision of the Divisional Court.

Action to recover the amount due on a promissory note, which was alleged to have been made by the defendants as security for the repayment of money due, or which might become due, to the Bank from the Liverpool Property Company, Limited.

An order for discovery of documents having been obtained by the plaintiffs, one of the defendants, Wing, made an affidavit which contained the following statement: —"I have in my custody, but not otherwise than as hereinafter mentioned in my possession or power, the documents relating to the matters in question in this action set forth in the third schedule hereto. I have not, and I never had, any property in the said documents myself. I originally had the custody of the said documents merely as the secretary and on behalf of the Liverpool Property Company (Limited), (the plaintiffs' principal debtors in the pleadings in this action mentioned); and I now have the custody of the said documents merely as the liquidator appointed in the winding-up of the said Liverpool Property Company (Limited), under the provisions of the Companies Acts, 1862 to 1883. I object to any order being made upon me for the production of the documents in the third schedule mentioned, on the ground that my custody thereof as hereinbefore mentioned is not such a possession as imposes upon me a liability to produce the same to the plaintiffs under an order for discovery in this action." The documents set forth in the third schedule included the bankers' pass-book and the directors' minute-book of the Liverpool Property Company (Limited).

It was admitted that although the defendant had been the liquidator of the company, and the books had come into his custody as such liquidator, the liquidation proceedings had come to an end and the company had been dissolved before the commencement of the action.

The Divisional Court (Lord Coleridge, C.J., and Field, J.), reversing a decision of Pollock, B., in chambers, ordered the documents to be produced for inspection.

The defendants appealed.

R. O. B. Lane, for the defendant Wing. —The defendant Wing only holds these documents as trustee for the company, of which he was the liquidator. The mere

* *Coram* Brett, M.R., Baggallay, L.J., and Bowen, L.J.

physical possession of the documents is not sufficient. The action is against several defendants, of whom Wing is one, on a joint and several promissory note made by them as the directors of the company. Wing does not hold the documents in his own individual interest, and therefore, as they are not in the control of the defendants, they are not within the rule as to inspection, and no order for their production ought to be made. The Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 94, 154, and 155, and *Buckley on the Companies Acts* (4th ed.), at p. 241, were referred to.

Forbes, Q.C., and *C. Gould*, for the defendant Cooper.

T. H. Hall, for the plaintiffs, was not called on.

BRETT, M.R.—The question is whether Wing is bound to produce for inspection the documents which have been set forth in an affidavit of documents and must be taken as admitted to be pertinent to the plaintiffs' case. It has been contended that an order cannot be made for their production, upon the ground that although they are in his possession they are not in his control. *Prima facie*, as they are in his possession, they are in his control; but this may be met by shewing that they are in his possession as the servant or agent of some other person who has legal authority to say that he shall not produce them. But that person must be some one who has control over him and can prevent the documents being produced. It was contended that the documents belonged to a company of which Wing was a director, but he had also been appointed the liquidator of the company, and the liquidation proceedings having come to an end and the company having been dissolved, the documents remained in his hands. He is therefore a person who under section 155 of the Companies Act, 1862, is bound to keep them for five years in order that they may be used by any person who has or claims an interest in them, and at the end of that period he will no longer be answerable for them. They are therefore in his possession and he is bound to keep them. There is no person in existence who can either actually or legally give any order in respect to them; Wing is therefore, under the circumstances, the sole and absolute master of the documents for five years, and as he has an absolute control over them he is bound to produce them.

BAGGALLAY, L.J.—I am of the same opinion. Wing was a proper party to the action, and is therefore bound to produce the documents which are in his possession, power, or control. We find from the different sections of the Companies Act, 1862, and from the events which have happened, that the documents are in his control.

BOWEN, L.J.—I am of the same opinion. These documents are in both the control and possession of Wing. It is not necessary to consider whether he has any property in them.

BRETT, M.R.—I cannot conceive that the property in goods which belonged to a corporation which has been put an end to is in the mere members of that corporation.

Appeal dismissed.

Solicitors—Deacon, Son & Gibson, agents for Vickers, Sons & Brown, Sheffield, for plaintiffs; J. & R. Gole, agents for Pashley & Hopkinson, Rotherham, for defendants; Jaques, Layton & Jaques, agents for Cooper & Porrett, Sheffield, for defendant W. Wing.

[IN THE COURT OF APPEAL.]

1885. May 6, 22. THE QUEEN (*on the prosecution of the* JUSTICES OF DEVON) *v.* THE LOCAL GOVERNMENT BOARD.

Highways — Main Roads — Turnpike Roads — Provisional Order declaring a Main Road to be a Highway—Time for Application for—Local Government Board —Highways and Locomotives Amendment Act, 1878 (41 *&* 42 *Vict. c.* 77), *ss.* 13 *and* 16.

[For the report of the above case, see 54 Law J. Rep. M.C. 104.]

[IN THE HOUSE OF LORDS.]

1885.
March 19, 20, 23.
May 12.

SVENSDEN AND OTHERS v. WALLACE BROTHERS.

Ship and Shipping—General Average—Port of Refuge—Expense of reloading Cargo.

A vessel having suffered a particular average loss, the captain, acting properly for the safety of the common adventure, put into a port of refuge and unloaded the cargo. The vessel was then repaired, reloaded, and completed her voyage:—Held (*affirming the decision of the Court of Appeal*), *that the expense of reshipping the cargo was not chargeable to general average.*

Whether the expenses incurred for pilotage and other charges in leaving port were the subject of general average was not decided.

This was an appeal from a decision of the Court of Appeal which reversed one of Lopes, J. The case is reported in the Courts below—52 Law J. Rep. Q.B. 396; 53 ibid. 385; Law Rep. 11 Q.B. D. 616; ibid. 13 Q.B. D. 69.

A vessel on a voyage from Rangoon to Liverpool sprang a leak, which made it dangerous to continue the voyage. The captain, acting for the safety of ship and cargo, put into the port of St. Louis in Mauritius. While the ship was in harbour the water continued to rise, and for the common safety the cargo was unloaded. The vessel was then taken into dry dock and repaired, after which she reloaded and completed her voyage.

The questions raised on this appeal were whether the cargo was liable to a general average contribution in respect of the expenses of reloading and pilotage and other charges in leaving port. Lopes, J., held that it was, the Court of Appeal that it was not.

The House found it unnecessary to decide more than the question as to the expense of reloading.

C. Russell, Q.C., and *Cohen, Q.C.* (*H. D. Warr* with them), for the appellants.—The question raised on this appeal is a new one—namely, whether when a ship puts into a port of distress the cost of storing the cargo during repairs, reloading, and leaving port to resume the voyage are the subject of general average. The appellants rely on *Atwood* v. *Sellar* (1).

The only difference between that case and this is that in *Atwood* v. *Sellar* (1) the mast had been cut down. Had it been blown away the two cases would have been identical. The practice of average adjusters not to treat these expenses as general average was relied upon by Manisty, J., who dissented in *Atwood* v. *Sellar* (1). Here the attempt to prove such practice failed. The appellants' adjuster was Mr. Lowndes, the "eminent adjuster" referred to in *Atwood* v. *Sellar* (1). The reasoning of Cockburn, C.J., and Thesiger, L.J., is wholly applicable to the present case, and does not turn at all on points in which the cases differ. The true principle is, that if the expenses are incidental to the sacrifice they are the subject of general average. Here admittedly the sacrifice—namely, the deviation—was voluntary in the special sense of the term—that is, what a prudent man would think it necessary to do. It was also extraordinary, though that is not essential. The expenses of storing and reloading are incidental to going into port for repair. The whole expense was incurred when the step (the deviation) was taken which led to them. In *Job* v. *Langton* (2), a case of voluntary stranding, it was admitted in argument that the whole expense was the subject of general average—that is, that the stranding, unloading, reloading, &c., must be treated as one operation: see *Lowndes on General Average* (3rd ed.), 106, 110, 111.

In order to ascertain what consequences of a general average act are the subject of general average, it is necessary to take into account what was in the contemplation of the master when he made the sacrifice. In the old times the merchants were generally on board and were consulted: see *Laws of Oleron*, art. 9, *Lowndes on General Average*, p. 48. Now the master has to decide, and he ought to be free from

(1) 48 Law J. Rep. Q.B. 465; 49 ibid. Q.B 515; Law Rep. 4 Q.B. D. 342; ibid. 5 Q.B. D 286.

(2) 6 E. & B. 779; 26 Law J. Rep. Q.B. 97.

considerations which might prejudice him and prevent his taking the most beneficial course.

There are no very early authorities. The oldest is *Da Costa* v. *Newnham* (3), in 1788, where the same point arose as here. That was followed in *Plummer* v. *Wildman* (4) in 1815. In *Power* v. *Whitmore* (5), in 1816, it was held that the expense of repairing was not general average unless the damage was voluntary. *Abbott on Shipping* (5th ed.), paragraph headed "Ship's Expenses in Port of Refuge"; 3 *Kent's Commentaries*, 235; 2 *Arnould's Marine Insurance* (2nd ed.), ss. 335, 336, where *Hallett* v. *Wigram* (6) is discussed; *Philipps on Insurance*, ss. 1320, 1326. The only other direct authority is *Atwood* v. *Sellar* (1). In *Job* v. *Langton* (2) Lord Campbell expressed the opinion that these expenses could not be distinguished from those incurred in repairs. But in America they are treated as general average, while repairs (except where the loss is voluntary) have never been so treated—*Moran* v. *Jones* (7), *Baily on General Average*, pp. 35, 42 (rule 16).

Formerly average adjusters were strongly against allowing as general average the consequences of general average acts—*Stewart* v. *The West India and Pacific Steamship Company* (8); but the practice has been altered since *The Whitecross Wire Company* v. *Savill* (9).

Webster, *Q.C.*, and *Mylburgh*, *Q.C.* (*J. Gorell Barnes* with them), for the respondents.—The principle must be either—1. That the original cause is to govern the allocation of the expenses; or, 2. That no expenses are general average unless they were themselves necessary to avert a common peril. The Court of Appeal have treated *Atwood* v. *Sellar* (1) as decided upon the first of the above principles. If so, it was wrongly decided; if not, it does not include the present case. The second principle is the true one. It cannot be right that these expenses should be general average, for it is not necessarily for the benefit of the cargo that it should be carried forward in the same ship. Suppose a vessel bound from India to London obliged to put into Falmouth, the cargo owner would not want to wait till the repairs had been executed. The repairs are in fact done to enable the freight to be earned, not for the common benefit, except in such a case as putting in to a desert island where no other ship is likely to call; in which case the whole expense, including repairs, might be general average. Here the master might have sent the goods forward in another ship in order to earn the freight. As to the ship-owner's duty in respect to repairs see *Moss* v. *Smith* (10), *Benson* v. *Chapman* (11), *Benson* v. *Duncan* (12), *Shipton* v. *Thornton* (13), *Abbott on Shipping* (5th ed.), 241, and *Wilson* v. *The Bank of Victoria* (14). The judgment of Cockburn, C.J., in *Atwood* v. *Sellar* (1) was not adopted by the Court of Appeal. In *Worms* v. *Storey* (15), cited by Cockburn, C.J., the question was one of damage to cargo by reason of the ship, after going into port, putting to sea again in an unseaworthy state. It was held that she must repair or abandon the voyage—*De Cuadra* v. *Swann* (16). The appellants' contention ignores the ship-owner's obligation to repair. Before *Atwood* v. *Sellar* (1) adjusters always treated general average as ceasing from the point when the goods are in safety.

The text-books are very unsatisfactory; the expressions vary in the different editions, and are not always supported by the authorities cited. The passage in *Lex Mercatoria*, cited in *Da Costa* v. *Newnham* (3) and in the argument in *Plummer* v. *Wildman* (4), probably only lays down the law of foreign countries, and seems to

(3) 2 Term Rep. 407.
(4) 3 M. & S. 482.
(5) 4 M. & S. 141.
(6) 9 Com. B. Rep. 580; 19 Law J. Rep. C.P. 281.
(7) 7 E. & B. 523; 26 Law J. Rep. Q.B. 187.
(8) 42 Law J. Rep. Q.B. 84, 191; Law Rep. 8 Q.B. 88, 362.
(9) 51 Law J. Rep. Q.B. 426; Law Rep. 8 Q.B. D. 653.
(10) 9 Com. B. Rep. 94; 19 Law J. Rep. C.P. 225.
(11) 2 H.L. Cas. 696.
(12) 3 Exch. Rep. 644; 18 Law J. Rep. Exch. 169.
(13) 9 Ad. & E. 314; 8 Law J. Rep. Q.B. 73.
(14) 36 Law J. Rep. Q.B. 89; Law Rep. 2 Q.B. 203.
(15) 11 Exch. Rep. 427; 25 Law J. Rep. Exch. 1.
(16) 16 Com. B. Rep. (N.S.) 772.

be borrowed from *Riccard Négoce d'Amsterdam*, p. 280. *Da Costa* v. *Newnham* (3) is in the appellants' favour, but has been discredited—*Birkley* v. *Presgrave* (17). In principle the expenses incurred for landing and storing the cargo ought not to be general average; but there is a custom so to treat them, and the respondents have not disputed it. The common benefit to be looked to is the putting in safety, not the completing the voyage—*Hallett* v. *Wigram* (6), *Hall* v. *Janson* (18), *Job* v. *Langton* (2), *Walthew* v. *Mavrojani* (19), *Harrison* v. *The Bank of Australasia* (20), and *The Rona* (21).

If the line is not to be drawn at the cesser of common peril, then the unloading and reloading ought to be treated as accessories of the repairs, and be general or particular average according as the repairs are. Either way the respondents succeed.

Cohen, Q.C., in reply.

Cur. adv. vult.

LORD BLACKBURN (on May 12).—The question intended to be brought before this House is raised in a somewhat unusual way.

The appellants (plaintiffs below) are the owners of a vessel, the *Olaf Trygvason*. The nationality of the vessel is immaterial. She took on board at Rangoon a cargo of rice. A bill of lading for the whole cargo was signed, of which the material part is as follows:—"Shipped in good order and well-conditioned by the Bombay Burmah Trading Corporation (Limited), in and upon the good ship called the *Olaf Trygvason*, now riding at anchor in the Rangoon river, and bound for Scilly, Falmouth, Plymouth, or Cowes for orders, thirteen thousand five hundred and eighty-three bags cargo rice, to be delivered in the like good order and well conditioned at the port of discharge (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatsoever nature and kind excepted) unto order or to its assigns. Freight for the said goods payable as per charter-party." The ship was ordered to Liverpool.

The respondents (defendants below) are merchants in London who purchased the cargo of rice and became assignees of the bill of lading. On the arrival of the ship at Liverpool the respondents, as holders of the bill of lading and consignees of the whole cargo, were entitled to have the cargo delivered to them on discharging the lien of the shipowners. But the captain had a lien on it, not only for the freight, as to which there was no dispute, but also for the payment of such disbursements as formed a charge on the cargo, as to the amount of which there was and is a dispute, and also for any amount which the cargo had to contribute to general average, as to the amount of which, also, there was and is a dispute.

This often occurs, and it gives rise to a difficulty which is well expressed in the preamble to the average bond signed in this case:—"Whereas the said ship lately arrived in the port of Liverpool on a voyage from Rangoon, and it is alleged that during such voyage she met with bad weather and sustained damage and loss, and that sacrifices were made and expenditure incurred which may form a charge on the cargo or some part thereof, or be the subject of a general average contribution, but the same cannot be immediately ascertained, and in the meantime it is desirable that the cargo should be delivered."

The mode in which this difficulty is commonly dealt with has, at least for more than eighty years (see *Myer* v. *Van der Deyl* (22)), been, that the captain agrees to give up his lien on payment of the freight payable on delivery, and the various consignees of the cargo agree, in consideration thereof (and if required, give security), to pay to the owners of the ship the proper proportion of any particular or other charges which may be chargeable on their respective consignments, or of any general average to which the owners of

(17) 1 East, 220.
(18) 4 E. & B. 500; 24 Law J. Rep. Q.B. 97.
(19) 39 Law J. Rep. Exch. 81; Law Rep. 5 Exch. 116.
(20) 41 Law J. Rep. Exch. 36; Law Rep. 7 Exch. 50.
(21) 5 Asp. Mar. Law Cas. 259.
(22) Abb. on Shipping, 5th ed. 362.

such consignment as such may be liable. As in the present case there was only one owner of the whole cargo, and no dispute as to either the quantity of the cargo or the amount of the freight, this left only two things to be determined—the amount of the special charges on the cargo which were payable by the respondents, and the amount of the general average charges of which the respondents have to pay the proportion payable in respect of the cargo and of the freight paid in advance at Rangoon, which in effect was a part payment of the price of so much of the cargo, the proportion payable in respect of the ship and of the freight not yet paid being payable by those interested in them.

The facts as to what took place on the voyage, what were the disbursements actually made, and under what circumstances they were made, cannot be proved by legal evidence without much delay and expense; but at least, when there is no suspicion of fraud or falsehood, the ship's papers enable an average adjuster of competent skill to approximate to them sufficiently to decide the case as an arbitrator, if the parties choose to give him authority so to act, or, if they do not so authorise him, to apply the principles generally acted on by average adjusters so as to produce a practical result on which the parties can, and generally, if the average adjuster is of repute, do act, as having the moral weight of an award, though either party may, if they please, question his findings either of fact or of law, for it is not an award.

In the present case two firms of repute, Lowndes & Ryley of Liverpool, and W. Richards & Son of London, were employed to prepare adjustments. Each, as is usual, prefixed to the statement extracts from the ship's papers, shewing the state of facts on which they acted. These are almost identical; and I think, looking at the two adjustments, they are agreed up to a certain point—and if it is open to me to form my opinion from the ship's papers, I should say that, so far, no reasonable person could differ from them.

The vessel sailed from Rangoon on the 30th of March, 1880. She took the ground at low tide, but got off at high tide, and proceeded on her voyage after this accidental stranding. Till the 19th of May she continued on her voyage, and on that day she deviated from the course of the voyage and ran for Mauritius. During these seven weeks she encountered strong winds and heavy seas, which caused the ship to strain, and labour, and make water. There was nothing, however, beyond ordinary perils of the seas, except that some spars and canvas were sacrificed in order to erect a windmill to assist in working the pumps. The cost of replacing those, less the usual allowance of one third new for old, about 10*l.*, is allowed in general average by both adjusters. But it is clear that the vessel did not run for Mauritius on account of the windmill, and, except as evidence confirmatory of the extent to which she was leaking by the 19th of May, this is not material. Had the deviation not been justified by a sufficient cause it would have rendered the shipowners liable (see *Davis* v. *Garrett* (23)), and therefore it is important to see what was the state of the vessel on the 19th of May. Not only was she leaking, at the rate of nine inches an hour, but when she came to anchor on the 22nd in the harbour of St. Louis she was found in the harbour to be making 10½ inches of water per hour; so that, though there is no extraordinary weather noticed, the leak had in that day and a half increased greatly, and it was necessary to hire a considerable number of shore labourers, who were employed to pump her. The surveyors, who saw her on the 22nd whilst afloat in the harbour, found her still making 10½ inches an hour, and recommended the cargo to be discharged until the leak stopped, or the vessel became sufficiently lightened to be placed in dry dock. On the 4th of June, the whole cargo with the exception of about a hundred tons having been discharged, the surveyors again examined her, and found the vessel still making seven inches of water per hour. They recommended the vessel to be put in dry dock for further examination of her bottom, which was done.

It seems impossible to come to any other conclusion than that the vessel, though perhaps she might have reached her desti-

(23) 6 Bing. 716.

nation with such a leak, would have been in great danger, and consequently that it was quite justifiable to run into St. Louis; nor can it, I think, be disputed that everything which was done after the vessel came into harbour until the vessel was removed into the dry dock was reasonably done with a view to the common safety of ship, cargo, and freight, which, while such a leak existed, were not in safety even in the harbour. Both adjusters must have agreed on this, for I find that each of them allows as general average all the extra expenses up to that date, including port dues and pilotage inwards, the hire of the labourers who pumped, the expenses of the survey, and the expense of landing the portion of the cargo unshipped between the 22nd of May and the 4th of June, as well as the cost of replacing the spars, &c., sacrificed to make a windmill, amounting, in the whole, in round numbers to nearly 300*l.* to general average. And if that had been all, there would have been no difference between them, and probably no dispute between the parties. But a difference —which any one who has read the case of *Atwood* v. *Sellar* (1), and who was aware that the members of the firm of W. Richards & Sons are leading members of the association mentioned in the 5th paragraph of the Special Case there stated, and that Mr. Lowndes was the eminent average adjuster mentioned in the 6th paragraph, must have anticipated—arose. Messrs. Lowndes & Ryley charged to general average the expenses of warehousing and insuring the cargo when on shore, amounting in round numbers to 190*l.*, and the expenses of reshipping the cargo, amounting in round numbers to 446*l.*, and the outward dock dues, amounting in round numbers to 20*l.*, and the outward pilotage, about 5*l.* They charged about 30*l.* as special average to cargo, and nothing to freight. Messrs. W. Richards & Sons charged the expenses of the cargo on land, amounting in round numbers, as already stated, to 190*l.*, to cargo, as well as the smaller item of 30*l.*, as to which there is no controversy; and the other items which Messrs. Lowndes charge to general average, amounting in round numbers to near 500*l.*, to freight.

Both agree in charging the expenses of taking the ship into dry dock, and the much more heavy expenses of repairing the vessel, amounting altogether to 1,866*l.*, to ship and owners of cargo, so that there is no dispute as to those items.

There is some difference, apparently, as to the value put upon the ship as a contributory subject, into which it is not necessary to enquire.

The result is, Lowndes & Co., apportioning the general average as they made it out amongst the subjects contributory as they valued them, made Messrs. Wallace, as owners of the cargo and the prepaid freight, liable to pay as contribution to general average 740*l.*, and in respect of particular average 30*l.*, in all 770*l.*—I omit shillings and pence. Messrs. Richards & Sons made them liable to pay as contribution to general average 467*l.*, as particular average on the cargo 215*l.* (including the 30*l.*), in all 681*l.*—I again omit shillings and pence. Messrs. Wallace paid that sum, and for the difference between it and 770*l.* this action was brought.

There were two issues joined, one on a plea that there was a custom so general as to have the effect of being incorporated in all contracts, by which the rule of practice of adjusters contended for by the respondents was established, which was denied. The other was a general plea of payment before action of 681*l.* 13*s.* 1*d.*, to which the plaintiffs replied that they had received it, but that it was not enough to satisfy their claim. Both issues came on to be tried before Mr. Justice Lopes and a special jury. The Judge ruled that there was no evidence fit to be left to the jury in support of the custom. On this there has been no appeal to this House. The jury were discharged on the issue as to the sufficiency of the payment, and that was reserved for further consideration. No evidence was called on this issue, and nothing was said as to how the facts were to be ascertained if it became material to ascertain any of them not expressly admitted. I do not think it was supposed by either side—certainly, from the terms of his judgment, not by Mr. Justice Lopes —that anything could depend on the special circumstances; it was not until in reading the judgment of Lord Justice Bowen I came upon this opinion: "The question whether extraordinary expen-

diture after the entry into a port of refuge is rightly chargeable to general average *necessarily* depends on the circumstances of each case," and on further consideration agreed in it, that I became aware of the importance of having some means of ascertaining what the circumstances were. Without some such power, no judgment, except a *venire de novo*, could be given, unless it could be laid down as a general proposition of law, either that no expenses of warehousing the cargo and afterwards reshipping it in a port of refuge can ever be general average expenses, or that they must always be so. I am not prepared to assent to either proposition. Any State may, by its legislature, enact that within its territories the law shall be either way. Judging merely from the language of their codes (which, however, is often apt to mislead, unless construed with reference to their law and usage), I should say that some foreign nations have enacted in opposite ways. There is, however, no English enactment on the subject. I have no doubt that both parties would, if it had occurred to any one that it was necessary or even desirable so to do, have readily agreed to give the Court power to look at the ship's papers, and, if it thought fit, draw inferences from them as an average adjuster would do. I propose to deal with this case as if such a power was given.

In *Simonds* v. *White* (24), Chief Justice Abbott says: "The principle of general average, namely, that all whose property has been saved by the sacrifice of the property of another shall contribute to make good his loss, is of very ancient date and of universal reception among commercial nations. The obligation to contribute, therefore, depends not so much upon the terms of any particular instrument as upon a general rule of maritime law. The obligation may be limited, qualified, or even excluded by the special terms of a contract as between the parties to the contract, but there is nothing of that kind in any contract between the parties to this cause. There are, however, many variations in the laws and usages of different nations as to the losses which are considered to fall within this principle."

(24) 2 B. & C. 811.

The point decided in that case was that the loss was to be adjusted according to the law of the place of the destination—in that case Russia—and that the Russian adjuster was to adjust it according to the Russian law, which of course was to be gathered from the Russian edicts and the decisions of the Russian judicature; and that, though the ship and the parties were English, the goods owners could not recover back so much of the money as would not have been charged to them on an adjustment of average made according to the law of England. As in the present case the place of delivery was English, this is an authority, if one was required, to shew that the law and usage of foreign nations where they differ from our own are irrelevant. But it will be observed that Chief Justice Abbott expressly says that a contract might alter the whole; and in *Wilson* v. *The Bank of Victoria* (14) it was intimated that a custom tacitly making it part of the contract that any particular principle should be applied might alter the whole. I think that, unless it was proved that there was such a custom as to be tacitly incorporated, it could have no such effect. And I have no doubt that the issue, which has not been brought here by appeal, was rightly decided.

I think, however, there is much force in the concluding observations of Mr. Justice Manisty in *Atwood* v. *Sellar* (1). I agree with him at least thus far, that a general practice, long continued amongst English adjusters, affords strong ground for thinking that the practice is one which is not in general inconvenient, and that it throws a considerable onus on those who impugn it to shew that the particular circumstances are such as to render an adherence to the practice in that case against principle.

Before proceeding further, I think it desirable to consider what is the question raised on the issue reserved for further consideration. The plaintiffs claimed the sum which Messrs. Lowndes & Ryley made payable—namely, 770*l*. The defendants had paid the sum which Messrs. W. Richards & Sons made payable by them. The issue was whether all that was really due had been paid. It is to be observed,

first, that the points on which Messrs. W. Richards & Sons differ from Messrs. Lowndes & Ryley are not all in favour of the defendants. If the 190*l.*, which represents the warehousing rent and fire insurance, is properly charged to cargo, the defendants have to pay the whole of it. If it is properly charged to general average, they have only to pay their proportion of it, or somewhat less than one half. That, if it stood alone, would make nearly 100*l.* more payable by the defendants. But if the 450*l.*, which is the cost of re-shipping, is properly charged to freight, the defendants are not liable to pay any portion of it. If it is properly charged to general average, they would have to pay about half of it. So that that item makes a difference of about 230*l.* If, in addition, the 20*l.* for the cost of going out of port is properly charged to freight, that makes a further difference of about 10*l.* It is not, therefore, necessary to decide anything more than whether these two items are, under the circumstances of the case, properly chargeable to general average or not. If they are not so chargeable, the order appealed against is right, for the defendants have paid enough, and more than enough, whether the 190*l.* is properly chargeable to cargo or not; and it is unnecessary to consider that question except in so far as it may throw light on the principles which are to guide the decision of the first and most important one.

I do not think it necessary to enquire what would be the proper course if the seeking the port of refuge had been solely for the purpose of doing repairs, the cargo not being in any danger. Such a case may perhaps sometimes, though rarely, occur. Nor do I think it necessary to enquire what would be the proper course if the ship and cargo were both safe in the harbour of refuge, and the unloading of the cargo was entirely for the purpose of facilitating the repairs. Such a case seems more likely to happen than that first supposed. I think on examining the two adjustments, and exercising the power which I have assumed to be given, there can be no doubt that the cargo on board the ship, leaking to the extent which she did, was not safe even in harbour until the ship was so far lightened that she could be taken into dry dock. Should the expense of reloading her, after the repairs were made, be charged to freight, the goods having been taken out under such circumstances? I think it should.

I am afraid I have not understood the reasoning on which Lord Chief Justice Cockburn, in his judgment in *Atwood* v. *Sellar* (1), comes to a contrary conclusion. If I have, I must express dissent from it.

The ordinary contract between shipowner and merchant is that the goods shall be carried to their destination, and shall there be delivered, unless prevented by the excepted perils. And this generally should be done in the original ship. Whenever the ship is disabled it must, in order literally to fulfil this contract, be necessary to repair the ship so far as to make her fit to carry on the cargo, and if any part of the cargo has been taken out to reship it.

Rosetto v. *Gurney* (25) was a case between the owners of corn insured from Odessa to Liverpool and their underwriters. The plaintiffs claimed for a total loss, and the underwriters paid money into Court. The cargo was at Cork in a very damaged state, but by great skill, and at considerable cost, was prevented from turning into manure, and was sold at Cork, a considerable part of it being still corn. The verdict was entered for a total loss. A rule for a new trial was obtained on various grounds: one, on which it was made absolute, was that the Judge had not properly directed the jury as to the effect of the extra cost of conveyance in a new bottom from Cork, the port of distress where the wheat was sold, to Liverpool, the port of destination.

The Court say as to this, "If the voyage is completed in the original ship it is completed upon the original contract, and no additional freight is incurred. If the master tranships because the original ship is irreparably damaged without considering whether he is bound to tranship or merely at liberty to do so, it is clear that he tranships to earn his full freight; and so the delivery takes place upon the original contract." There never was in the present case any question as to the *Olaf*

(25) 11 Com. B. Rep. 188; 20 Law J. Rep. C.P. 257.

Trygvason being irreparably damaged; but she was so far damaged that it was certain that there would be some delay (it turned out to be about six weeks) before the *Olaf Trygvason* was in a fit state to carry the goods on to Liverpool. And if there had been a good ship at St. Louis willing to carry the goods to their destination for less than the agreed freight from Rangoon, it might have been for the benefit of all that the goods should be shipped on that vessel at once, carried on, and delivered to the consignee without delay. Such was the course pursued in *Shipton* v. *Thornton* (13), where the original shipment was from Singapore to London in the *James Scott*. She put into Batavia in distress, and there the goods were transhipped into the *Mountaineer* and the *Sesostris*, carried to London, and there delivered to the owner of the *James Scott* at a cost less than the amount of freight which he would have earned had the goods been carried on in the *James Scott*. He delivered them to the consignee, who produced the original bill of lading by the *James Scott*. The consignee refused to pay freight at the rate in the bill of lading of the *James Scott* from Singapore to London, though he paid that from Batavia agreed on in the bills of lading of the *Mountaineer* and the *Sesostris*. The decision was, that whether or not the captain was bound to tranship, he was at liberty to do so, and having done so, had earned his full freight, the expense which he had incurred to earn it being certainly not general average, but I think a particular average paid by the shipowner to earn his freight. My conclusion is that, if, instead of transhipping, the captain waits till the original ship is repaired, and then reships on that original ship, the cost of so doing should not be general average but particular average to earn the full freight. Lord Chief Justice Cockburn seems to think that in all cases where the ship is disabled, whether she can be repaired or not, the original contract is dissolved and a new one formed by law. This seems to me in direct conflict with the two decisions I have just cited; and even if it were so, I think it is somewhat in the nature of a *petitio principii* to say that one of the terms of the new contract should be that the cost of transhipment or reshipment, as the case may be, should be general average.

The judgment, however, of the Court of Appeal, delivered by Lord Justice Thesiger, does not proceed on this ground. I have some difficulty, after reading the statement as to the grounds on which the Court of Appeal proceeded, given by Lord Justice Baggallay in his judgment in the present case, in saying on what ground it does proceed.

The Special Case in *Atwood* v. *Sellar* (1) was express that the ship was injured by a voluntary sacrifice, and was thereby compelled to put in to Charleston to repair the said damage. It is not expressly said either way whether the cargo was in any danger. Lord Justice Baggallay, who was a party to that judgment, says that it was decided on the ground that putting into the port of refuge was necessary for the safety of both ship and cargo, and that he, at least, thought that it was immaterial what was the cause of that necessity. Yet I think there is much reason for doubting if Lord Justice Thesiger quite agreed in this. He says, "The principle which underlies the whole law of general average contribution is that the loss, immediate and consequential, caused by a sacrifice for the benefit of cargo, ship, and freight should be borne by all. This principle is in the abstract conceded by counsel for the defendants, and its application to the present case is admitted to the extent of allowing the expenses of unloading the goods, for the purpose of doing the necessary repairs to enable it to proceed on the voyage, to be the subject of general average contribution; but they attempt to distinguish such expenses from those of warehousing and reloading the cargo, and of outward port and pilotage charges, by the suggestion that the common danger to the whole adventure is at an end when the goods are unloaded, and that general average ceases at the point of time when the common danger ceases." This is, I think, a fair statement of the argument of the respondents' counsel in the present case. Afterwards he says, "The going into port, the unloading, warehousing, and reloading, are at all events part of one act or operation contemplated, resolved upon, and carried through for the common safety

and benefit, and properly to be regarded as continuous." This was much relied on by the counsel for the respondents. If I thought it was the state of the case before the House, I should consider whether in such a case it might not fairly be argued that the whole of these operations were to be considered as parts of the expense of repairing the damage, and therefore, in a case where the cause of the damage was such that the expense of repairing it ought to be borne by all, as was the case in *Atwood* v. *Sellar* (1), to be borne by all, but that in a case where the cause of the damage was such that the expense of repairing it ought to be borne by the ship only, which is the present case, to be borne by the ship only. But having come to the conclusion that such is not the state of the case before the House, I do not enter into this enquiry.

Having come to the conclusion that, under the circumstances of this case, the expenses of reloading, &c., should not be placed to general average, and that being enough, if your Lordships agree with me, to shew that the respondents have paid more than enough, it is not necessary to consider whether the smaller sum of 20*l.* ought also to have been charged to ship or freight and not to general average. I agree with Lord Justice Bowen in what he says, that that is a more difficult question than the other. And as the amount is not sufficient to turn the scale, it is not necessary to decide it. I should think it seldom involved any sum so great as to be of practical importance, and I prefer leaving it undecided.

I shall therefore move that the order appealed against be affirmed, and the appeal dismissed; the appellants to pay the costs.

LORD WATSON.—I also am of opinion that in this case the order appealed from ought to be affirmed with costs. I have had the advantage of considering the opinion which has just been delivered by my noble and learned friend; and seeing that it expresses all that I desire to say upon the subject, I shall not venture to add any observations to it.

LORD FITZGERALD.—I too have had an opportunity of reading and considering the very able and instructive reasons given by my noble and learned friend now on the woolsack for his opinion, and to that opinion I can add nothing save to express my entire concurrence in it.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitors—Field, Roscoe & Co., agents for Bateson, Bright & Warr, Liverpool, for appellants; Waltons, Bubb & Johnson, for respondents.

[IN THE COURT OF APPEAL.]

1885. May 13. FOX AND OTHERS *v.* THE RAILWAY PASSENGERS' ASSURANCE COMPANY.*

Practice—Reference of Dispute to Arbitration—Condition Precedent to Right to sue—Railway Passengers' Assurance Company's Act, 1864 (27 & 28 *Vict. c.* CXXV.), *ss.* 3, 16, *and* 33.

The Railway Passengers' Assurance Company's Act, 1864, *provides by section* 3 *that any question arising on any contract of insurance shall, if either party require it, be referred to arbitration, and by section* 16 *that if there be any question or difference as to the liability of the company, it shall, if either the company or the persons claiming require it, and as a condition precedent to the enforcing of any claim to which the question or difference relates, be referred to arbitration. Section* 33 *provides that if any policy holder or his representatives begin any action against the company in respect of the matters to be referred to arbitration under the provisions of the Act, the Court or a Judge, on application by the company after appearance, "upon being satisfied that no sufficient reason exists why the matters cannot be or ought not to be referred to arbitration, and that the company were, at the time of the bringing of the action or suit, and still are, ready and willing to concur in all acts necessary and*

* *Coram* Brett, M.R., Baggallay, L.J., and Bowen, L.J.

proper for causing the matters to be decided by arbitration," may make an order staying all proceedings in the action or suit. The representatives of a policy-holder in the company made a claim against the company. The company disputed it, but did not give notice that they required the question to be referred to arbitration. The claimants then brought an action, whereupon the company took out a summons to stay proceedings in the action:—Held, *that the provisions of sections* 3 *and* 16 *apply to cases in which a reference to arbitration is required before an action is begun; that section* 33 *applies to cases in which an action has been begun before a reference is asked for, and that in such cases the party claiming has a right to bring an action, and that it must then be a question of discretion in each case whether the action ought or ought not to be stayed.*

Hodgson *v.* The Railway Passengers' Assurance Company (Law Rep. 9 Q.B. D. 188) *explained.*

Appeal by the plaintiffs from the decision of the Queen's Bench Division staying all proceedings in an action brought by them against the defendant company.

The plaintiffs were the legal representatives of a person who had insured his life in the defendant company, and he having died his representatives sued the company for the amount of the policy. This policy contained amongst other conditions the following: "5. Any question as to the liability of the company to pay the sum assured by the policy in case of fatal accident, or to make compensation at all in case of personal injury, or as to the amount of compensation or otherwise however arising hereunder, shall, if the company or the assured or his legal representatives require it, be referred to arbitration in the manner specified by the company's said Act."

The deceased met his death by falling from a carriage while travelling by railway.

The defendants disputed their liability on the ground of suicide or wilful exposure to danger by the assured, either of which would render the policy void.

The plaintiffs brought an action to determine the question of liability.

The defendants then took out a summons pursuant to the provisions of their private Act (27 & 28 Vict. c. cxxv. (1)) to stay all proceedings in the action. The Master refused to make the order, and the Judge at chambers affirmed his decision; but the defendants having appealed, the Queen's Bench Division considering that the case of *Hodgson* v. *The Railway Passengers' Assurance Company* (2) concluded this case, reversed the decision, and stayed the action.

The plaintiffs appealed.

Willis, Q.C., and *Morten*, for the appellants.

Grantham, Q.C., and *Ridley*, for the respondents.

BRETT, M.R.—I am of opinion that sections 3 and 16 of this private Act, 27 & 28

(1) The Railway Passengers' Assurance Company's Act, 1864 (27 & 28 Vict. c. cxxv.), section 3: "Any question from time to time arising on any contract of insurance hereafter entered into by the company, or hereafter at the company's option renewed by them, either by their receipt of premium thereon or otherwise, whether as to the liability of the company, or as to the amount or proportionate amount of compensation or otherwise, shall, if either the company or the assured or the representatives of the assured require it, be referred to arbitration under this Act."

Section 16: "If there be any question or difference as to the liability of the company to make compensation to any holder or party or his legal representatives, . . . or if there be any other question relating to the company's contract of insurance, . . . the question or difference shall, if either the company, or the holder or party or his legal representatives require it, and as a condition precedent to the enforcing of any claim to which the question or difference relates, be referred to arbitration. . . ."

Section 33: "If any holder or party or his legal representatives shall commence any action at law or suit in equity against the company in respect of the matters or any of them to be referred to arbitration under the provisions of this Act, the Court in which the action is brought or a Judge thereof, on application by the company after appearance and before plea or answer, upon being satisfied that no sufficient reason exists why the matters cannot be or ought not to be referred to arbitration, and that the company were, at the time of the bringing the action or suit, and still are, ready and willing to concur in all acts necessary and proper for causing the matters to be decided by arbitration, may make a rule or order staying all proceedings in the action or suit, on such terms as to costs and otherwise as to the Court or Judge seem fit."

(2) Law Rep. 9 Q.B. D. 188.

Vict. c. cxxv., apply before an action has been begun, and that section 33 of the same Act applies after an action has been begun. Section 3 does not make it a condition precedent to the right to bring an action that an arbitration should have been held: it only says that there shall be an arbitration instead of an action if either the company or the assured or the representatives of the assured require it. Then, turning to section 33 and comparing it with section 3, I think that the arbitration must be required before the writ is issued, and I think it only becomes a condition precedent if the arbitration is required before the action is begun. Section 16 provides that the question or difference shall be referred to arbitration "if either the company, or the holder or party or his legal representatives require it"; so that if an arbitration is required in the circumstances mentioned in that section, then the question or difference is to be referred, and the section expressly provides that it shall then be a condition precedent. If an action were brought after an arbitration had been required in a case under section 16, that fact could then be pleaded as a defence: so that it appears to me that the reference to arbitration is not a condition precedent to the right to begin an action, unless that reference is required before the action is begun. A person, therefore, who makes a claim under such a policy as this has a right, if no arbitration is required before action, to bring an action: and, that right existing, we must see whether the Legislature has given any power to stay that action. As the defendants had pleaded to the action, they could not claim, by virtue of section 33, to have the right to ask for reference to arbitration; but it is argued that they have such a right under section 3, and that that right they retain until verdict. Under section 33 it would lie on the defendants to shew that they had been ready and willing to concur in all matters necessary for referring the matter to arbitration, inasmuch as the plaintiff could not establish that; and then the section provides that the Court may make an order staying the proceedings, but it does not say that it must do so. I do not think that it is very important to decide upon whom the burden of proof lies when the question is whether the Court is or is not satisfied that a sufficient reason exists why the matters cannot or ought not to be referred to arbitration. It is not necessary to decide this; but I incline to think that as the three conditions in section 33 are joined by the word "and," the party on whom the burden of proof lies as to two of the conditions is the party on whom the burden lies as to the third condition also. In this case the Master was not satisfied that the proceedings ought to be stayed, nor was the Judge, but the Divisional Court differed from the Judge and stayed the proceedings in the action; but the Divisional Court did not differ on the point of discretion, for the Divisional Court thought the Court was bound by a decision of the Court of Appeal in *Hodgson* v. *The Railway Passengers' Assurance Company* (2). I am, however, of opinion that that case laid down no general rule of law, and I think the Divisional Court were misled by the impression that that case was decided on some general rule of law, and not, as it seems to me, on the facts of that case, which satisfied the Judge and the Court that that action ought to be stayed. Here I cannot say what the case at the trial may prove to be; so that I think this appeal ought to be allowed and the order of the Queen's Bench Division ought to be set aside.

BAGGALLAY, L.J.—I concur with the conclusion of the Master of the Rolls. Section 33 of 27 & 28 Vict. c. cxxv. recognises the right of the policy-holder or his representatives to bring an action for the matters dealt with in that section. It has been rightly said that as nothing was done under sections 3 or 16, the plaintiffs had a right to begin an action, and the Court ought only to stay it if under section 33 it is satisfied that no sufficient reason exists why the matters cannot be or ought not to be referred to arbitration; and it seems to me that the burden of proof lies on the company, for it is they who apply for the order. Section 33 further shews that the Court must be satisfied that the company were, at the time of the bringing of the action, and still are, ready and willing to concur in all acts necessary for

causing the matters to be decided by arbitration. As the Master of the Rolls has pointed out, the three clauses of the section are joined by the word "and"; besides, as to the last provision of the section, the plaintiff is not in a position to satisfy the Court, so that I think the defendant company would have so to satisfy the Court on that point. It has been said that the case of *Hodgson* v. *The Railway Passengers' Assurance Company* (2) establishes that in such a case as this the burden of proof is on the plaintiff; but on looking at the report and considering the affidavits used in that case, at which we have looked, it will be found that the case does not go as far as this: and there is this difference between that case and the present—that there the various tribunals before which the case came were all agreed that the action ought to be stayed; whereas in this case there has been a difference of opinion.

BOWEN, L.J.—Section 33 of 27 & 28 Vict. c. cxxv. is framed in terms similar to those of section 11 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125). According to the old law an agreement to refer did not oust the jurisdiction of the Courts; but that state of the law being found to work hardship, the provisions of the Common Law Procedure Act, 1854, section 11, were enacted, and under that section the defendant could obtain a stay of proceedings. That section applied, as does section 33 of the Act now under consideration, to actions which could be brought, and both these sections give a discretion to the Court to stay an action which a plaintiff has a right to begin.

In this case, if the defendant company had required an arbitration before the action was begun, then, by sections 3 and 16 of its private Act, the company would have been entitled to a stay of the proceedings in this action. Section 33 applies to cases in which an action may be brought, to cases in which the company has not required a reference to arbitration before the action was begun. In such cases and in certain circumstances the company may apply for a stay of proceedings, just as in cases under section 11 of the Common Law Procedure Act, 1854, an application for stay of proceedings in an action may be made. Here, however, as an arbitration was not required before the action was begun, the matter comes under section 33, and it comes to a question of discretion, for the Court or a Judge has to be satisfied that no sufficient reason exists why there should not be a reference to arbitration. Here there has been a difference of opinion; but the Divisional Court considered that they were bound by the case of *Hodgson* v. *The Railway Passengers' Assurance Company* (2). I think that that case turned on a question of fact, and did not lay down a general rule or put a construction on this statute. I think, therefore, we ought not to disturb the discretion which has been exercised by the Master and the Judge. I think that this case can be tried by a jury, and I agree that the action ought not to be stayed and that this appeal should be allowed.

Appeal allowed.

Solicitors—Duffield & Bruty, for plaintiffs; Ingram, Harrison & Ingram, for defendants.

1885. May 5. THE QUEEN *v.* THE GUARDIANS OF THE POOR OF ST. MARY, ISLINGTON; *in re* ALICE DAVIS.

Poor—Derivative Settlement—39 & 40 *Vict. c.* 61. *s.* 35—"*Child*"—*Pauper above the age of sixteen.*

[For the report of the above case, see 54 Law J. Rep. M.C. 110.]

[IN THE COURT OF APPEAL.]

1885. March 28, 30. May 4. THE QUEEN (*on the prosecution of* HILLMAN) *v.* WHITFIELD AND ANOTHER.

Lunatic — Jurisdiction of Justices to send to an Asylum—Personal Examination of, by Justices—16 & 17 *Vict. c.* 97. *s.* 68.

[For the report of the above case, see 54 Law J. Rep. M.C. 113.]

[IN THE COURT OF APPEAL.]

1885. June 18. } KNIGHT AND OTHERS v. CLARKE AND OTHERS.*

Landlord and Tenant—Action to recover Possession—Sub-lessee holding over after Expiration of the Term—Determination of Lessee's Title before Trial—Writ of Possession.

The lessee of land for a term of years demised the same for the residue of the term less three days. On the last day but one of the term granted under the original lease, the lessee issued a writ against the sub-lessee to recover possession of the land, but the action was not tried until after the determination of the lessee's title:—Held, *upon the authority of* Gibbins *v.* Buckland (1 Hurl. & C. 736; 32 Law J. Rep. Exch. 156), *that he was entitled to judgment, and to have execution by a writ of possession, the sub-lessee not having shewn that it would be futile or unjust for the writ to issue.*

Appeal from a judgment of Mathew, J.

Action to recover possession of certain land in the parish of St. George's-in-the-East, Middlesex.

By indenture dated the 20th of April, 1786, the freeholder of the land in question demised the same to the predecessors in title of the plaintiffs for a term of ninety-eight years from the 25th of March, 1786.

By another indenture, dated the 25th of January, 1810, the predecessors in title of the plaintiffs demised the same land to the predecessors in title of the defendants for the term of seventy-five years less three days from the 25th of March, 1809.

On the 24th of March, 1884, the writ of summons in the present action was issued. The defendant Clarke pleaded *inter alia* that the estate of the plaintiffs in the land had determined since the issue and service of the writ.

At the trial before Mathew, J., without a jury, it was proved that since the 24th of March, 1884, the freeholder had continued the defendants as tenants.

Mathew, J., gave judgment for the plaintiffs.

* *Coram* Brett, M.R., Baggallay, L.J., and Bowen, L.J.

The defendant Clarke appealed.

Gully, Q.C., and *R. Bray* (with them *B. L. Moseley*), for the appellant.—The plaintiffs are not entitled to have execution by a writ of possession. The term granted by the indenture of 1810 expired on the 22nd of March, 1884, that is, two days before the writ of summons was issued, and the term granted by the indenture of 1786 expired on the day after the writ was issued. Formerly, under section 181 of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), now repealed by 46 & 47 Vict. c. 49. s. 3 and schedule, proceedings in an action of ejectment would not be stayed on the ground that the claimant's title had expired; and *Thrustout* v. *Gray* (1) shews that although a writ of possession could not issue, yet the claimant could proceed for damages and costs. So here, although the plaintiffs may be entitled to judgment, they are not entitled to a writ of possession, as their title has expired. In *Gibbins* v. *Buckland* (2) the Court of Exchequer allowed a writ of possession to issue, although the plaintiff's interest under the lease had expired; but it was not there proved that the plaintiff had no title at all. *Roe d. Morgan* v. *Bluck* (3) and *Buckland* v. *Gibbins* (4) were also referred to.

Bompas, Q.C., J. G. Witt, and *W. M. Spence*, for the plaintiffs, were not called on.

BRETT, M.R.—It seems to me that *Gibbins* v. *Buckland* (2) is a positive authority in favour of the judgment given by Mr. Justice Mathew. The plaintiffs were the landlords of certain premises, of which the defendant obtained beneficial possession for a certain period which was to end on a certain day. The defendant was therefore bound to give up possession to the plaintiffs on that day; but upon his declining to do so the present action was brought, in which it was proved that, as against the defendant, the plaintiffs were entitled to possession. It was con-

(1) 2 Str. 1056.
(2) 1 Hurl. & C. 736; 32 Law J. Rep. Exch. 156.
(3) 3 Campb. 447.
(4) 32 Law J. Rep. Chanc. 391.

tended on behalf of the defendant that, although the plaintiffs had a perfect cause of action, and were entitled to possession at the date when the action to recover possession was commenced, yet their title had expired after that date and before judgment. Under these circumstances I am of opinion that the defendant never had any title as against the plaintiffs. But then it was said that the plaintiffs ought not to have possession as against the defendant, because, as between the plaintiffs and the freeholder, the plaintiffs were not entitled to possession. The case of *Gibbins* v. *Buckland* (2), however, decides that where such a proposition is made by a person in the position of this defendant, it lies upon him to shew affirmatively that it would be futile and unjust for the Court to allow a writ of possession to issue, because although a plaintiff may have a right to possession as against the defendant, he has no such right as against some one else. Has the defendant proved that here? He has only proved that the freeholder asked for possession; but he has not shewn that it would be futile or unjust for the writ of possession to issue. The case of *Gibbins* v. *Buckland* (2) is an authority in favour of allowing the writ of possession to issue, and the defendant is not, by the mere fact of the trial of the action having been delayed, entitled to refuse to give up possession of land which by his contract he was bound to give up the moment the plaintiffs demanded it from him. The appeal must therefore be dismissed.

BAGGALLAY, L.J.—I am of the same opinion. It is true that the plantiffs had only a reversion of three days. But the question arises whether the delay in the trial of the action, the plaintiffs' reversion having expired in the meantime, and some one else having become the actual owner of the land, disentitles the plaintiffs to have execution by a writ of possession. Then, within the decision in *Gibbins* v. *Buckland* (2), the defendant might have shewn that the plaintiffs' title was at an end; but he has not done so, and the plaintiffs, if they had any title, would have a right to possession.

The case of *Roe d. Morgan* v. *Bluck* (3) affords an illustration; there a sequestration was issued and published, and the plaintiff was held to be entitled to the rents and profits of the glebe land from the time of the determination of the defendant's term up to the publication of the sequestration, but not afterwards, because it was established that the right to possession was after that time in some person other than the plaintiff to the action—namely, in the sequestrator. So also in the case of *Buckland* v. *Gibbins* (4), which was reversed by Lord Chancellor Westbury upon certain additional facts which were not before the Court of Exchequer in *Gibbins* v. *Buckland* (2), and which shewed what was required—namely, that the claimant had no title, because it was in some one else.

BOWEN, L.J.—I am of the same opinion. Plain justice and law are in favour of the plaintiffs. The question is whether, judgment having been obtained by the plaintiffs for possession, a writ of possession should be issued in conformity with that judgment. That writ is intended to further justice, and would not therefore be issued if justice were thereby to be defeated. If the possession of the plaintiffs, the right to which is being disputed as between them and the defendant, is vested in fact or in law in them, the Court will not deprive them of it. But it lies on the defendant to satisfy the Court that justice would be defeated by allowing the writ of possession to go. Here it would be unjust not to allow it to issue. The defendant would be getting the benefit of his own wrong. If he had gone out, the plaintiffs would have been entitled to the advantages of obtaining possession, and the defendant cannot, by means of his own possession, which was wrongful as against the plaintiffs, gain any advantage. The plaintiffs are really asserting here the right of their landlord.

Appeal dismissed.

Solicitors—John Knight & Co., for plaintiffs
T. Beard & Sons, for defendants.

[IN THE COURT OF APPEAL.]

1885. April 28. } GRÉBERT-BORGNIS *v.* J. AND W. NUGENT.*

Contract — Measure of Damages — Breach of Contract—Purchase of Goods to fulfil Sub-contract.

The defendants contracted with the plaintiff to deliver in Paris a certain number of sheepskins on certain specified terms as to quantity, price, and times of delivery. At the time of making the contract the defendants knew that the plaintiff was making it in order to fulfil another contract which was either then made or about to be made by him with a customer in Paris. The plaintiff, under this contract, sold the skins at a profit of five francs per skin. There was no market into which either the plaintiff or his customer could go to purchase the skins in question in the event of a breach of the contract. The defendants did not deliver the whole of the skins, and thereupon the plaintiff's customer sued the plaintiff in France for breach of contract, and recovered damages. In an action against the defendants for breach of contract,— Held, that the plaintiff was entitled to recover both the amount of profit which he would have made if he had fulfilled his contract with his customer, and also the damages paid by him in respect of his liability for breach of the contract with his customer, and that the amount recovered against him in France might, under the circumstances, be taken as a not unreasonable amount in estimating the damages for the defendants' breach of contract.

Appeal from a judgment of Denman, J.

Action to recover damages for breach of a contract entered into by the defendants to deliver to the plaintiff in Paris 243 black and white sheepskins from February to July, 1883, inclusive. At the time when the defendants made the contract they knew that the plaintiff was buying for the purpose of fulfilling a contract made or about to be made by him with a customer in Paris. The plaintiff, as soon as he had made the contract with the defendants, resold the skins to his customer at a profit of five francs per skin. The defendants only delivered forty-two skins; and the plaintiff could not obtain any skins in the market in order to perform his contract with his customer. The customer sued the plaintiff at Paris for breach of the contract with him, and the plaintiff was ordered by the French Court to pay, and did pay, 28*l.* damages and costs.

Denman, J., held that the plaintiff was entitled to recover not only 34*l.*, the profit he would have made on the resale, but also 28*l.*, the damages, but not the costs recovered against him in the French Court.

The defendants appealed.

Finlay, Q.C., and *R. Griffin*, for the defendants.—First, the verdict given was wrong; and secondly, the damages should be reduced by the sum of 28*l.* The finding of fact that the defendants knew that the skins were ordered to fulfil a contract made by the plaintiff with a customer in Paris is immaterial. It is admitted that the plaintiff is entitled to 34*l.* in respect of the loss of profit on the skins; but he is not entitled to recover 28*l.* as damages, the amount recovered against him in France for the non-fulfilment of his contract with his customer. Even if the defendants knew the contract was made with them to enable the plaintiff to fulfil his contract with his customer, he would only be entitled to recover the damages in respect of the loss of profit under the contract with his customer—*Borries* v. *Hutchinson* (1) and *Thol* v. *Henderson* (2). The case of *Elbinger Actien-Gesellschafft* v. *Armstrong* (3), upon which Denman, J., relied, does not apply, for there it was considered that penalties due under a contract to which the contract sued on was subsidiary could not as such be recovered, because penalties are not the natural consequences of a breach —*The Hydraulic Engineering Company* v. *McHaffie* (4).

O'Hanlan v. *The Great Western Railway Company* (5) and *Williams* v. *Reynolds* (6) were also cited.

(1) 18 Com. B. Rep. N.S. 445; 34 Law J. Rep. C.P. 169.
(2) Law Rep. 8 Q.B. D. 457.
(3) 43 Law J. Rep. Q.B. 211, 214; Law Rep. 9 Q.B. 473, 479.
(4) Law Rep. 4 Q.B. D. 670, 677.
(5) 6 B. & S. 484; 34 Law J. Rep. Q.B. 154.
(6) 6 B. & S. 495; 34 Law J. Rep. Q.B. 221.

* *Coram* Brett, M.R., Baggallay, L.J., and Bowen, L.J.

Horne-Payne, and *G. S. Bower*, for the plaintiff.—The defendants knew the exact terms of the contract made by the plaintiff with his customer, and that if they did not fulfil their contract he would be liable under the sub-contract. The defendants also must have known that the plaintiff would have to pay damages, as there was no market for the skins in question. The case falls within the rule laid down in *Hadley* v. *Baxendale* (7). They also cited *Hinde* v. *Liddell* (8).

Griffin replied.

BRETT, M.R.—I am of opinion that the judgment of Mr. Justice Denman must be supported. I think the learned Judge was justified in drawing the conclusion he did from the evidence that the plaintiff came over from Paris and informed the defendants in this country that he was about to complete or had completed a contract with a French customer in Paris, and that he wished the defendants to supply him with sheepskins so as to enable him to fulfil his contract with his customer. When, therefore, he sent over to the defendants the order to manufacture and deliver skins of different specialities as to quality and shape at different prices, and to be delivered in lots at different times, that order corresponded in truth with a contract which, in fact, although not perhaps in form, he then contemplated making or had made with his French customer. The defendants, as a matter of business, knew that the contract they made with the plaintiff was substantially the same as the one he had made with his customer, but with this difference, that he would be selling to his customer at a higher price than that which he was giving to the defendants. This is not the case of a person ordering goods from a manufacturer here which are to be sent abroad to be resold; for this manufacturer would from this alone know that they were to be resold at a profit. But it is more than that; the plaintiff was under a specific contract with a specific person, and purchased the skins to enable him to fulfil that contract. The defendants, by breaking their contract with the plaintiff, prevented him from fulfilling the whole of his contract with his customer. If there had been a market for the goods, the plaintiff would have been bound to go into the market and purchase goods so as to perform his contract with his customer; and if the market price was greater than the contract price he would be entitled to recover the difference from the defendants. But as there was no market the first head of damages is perfectly clear; he lost the profit of five francs per skin which otherwise he would have made. This was not disputed on behalf of the defendants, and the plaintiff's right to the sum of 34*l.* is therefore practically admitted. But then the plaintiff says that he has also lost an additional sum of 28*l.* by reason of his breach of contract with his French customer; and the question therefore arises, whether he can recover that sum or any loss in respect of damages which he had to pay to his French customer. The cases which have been cited are supposed to be cases which carry out the principle laid down in *Hadley* v. *Baxendale* (7). The result of those cases is, that a plaintiff who, under such circumstances as the present, seeks to recover in respect of liability which he has under a contract made with some third person must shew that the defendant at the time when he entered into the contract with the plaintiff knew of the contract with the third person, and entered into his contract upon the terms that he would be liable if by any act of his the plaintiff committed a breach of the sub-contract. If, however, the defendant did not know of the sub-contract, he would not be liable for any damages sustained by the plaintiff in respect of a breach of the sub-contract. Where there is no market for the goods, the sub-contract may be put in as evidence of what was the real value of the goods, and thus enable the plaintiff to recover the difference between the contract price and their real value. Where, however, the sub-contract was fully made known to him in all its terms, he would be liable; and the proper inference, and one which the jury or the tribunal which tried the case might draw, would be that he had contracted upon the terms that if he broke his contract he would be liable to

(7) 9 Exch. Rep. 341; 23 Law J. Rep. Exch. 179.

(8) 44 Law J. Rep. Q.B. 105; Law Rep. 10 Q.B. 265.

the plaintiff for all the consequences arising by reason of a failure on the part of the plaintiff to fulfil his sub-contract. But where a sub-contract has been made, the cases seem to me to have decided that the original vendor is only liable, where there has been a breach of contract, to the natural consequences of a breach of so much of the sub-contract as has been made known to him. If he has been told that the contract was that if the vendee did not supply the sub-vendee with the goods ordered from the vendor, he would be liable to pay 4*l.* for every ton which he did not deliver, then the vendor would have to pay that sum to the vendee. But supposing that the sub-contract contained a stipulation that in addition to the sum of 4*l.* a ton a penalty of 5*l.* a day was to be paid by the vendee, then the vendor would not be liable to pay that penalty upon breach of his contract, even though it is stipulated for in the sub-contract, unless that part of the sub-contract was made known to the vendor, for it would not be a natural consequence of his contract with the vendee. The cases seem to me to establish that the original vendor is only liable in respect of so much of the sub-contract as was made known to him. In *Borries* v. *Hutchinson* (1), which was a case tried before Mr. Justice Willes under the old system, the whole of the terms of the contract made between the vendee and a third person were not made known to the defendant; and the Court held as an inference of fact that so much of the contract as provided that the vendee had to deliver goods in Russia was made known to the defendant, and that there was a breach of contract by the defendant. The amount of profit which the vendee would have made was paid into Court by the vendor, so that there was no longer any dispute as to that, and the defendant was bound to know that the vendee would incur a loss of profit. Then came the question whether the vendee could recover two claims which he made. One of those claims was in respect of increased freight and insurance which the vendee had paid for sending the goods to Russia. It is well known in the Russian trade that the freight and insurance increase as the winter comes on, and that they are then very high. The vendor therefore, directly he knew that there was a contract to deliver goods in Russia, had notice that the vendee would have to pay increased freight and insurance if the goods were not delivered at the specified times, which must have been during the summer; and therefore, if he failed to deliver them, the natural consequence would be that the vendee would have to pay increased freight and insurance. The Court therefore came to the conclusion that the vendor was liable in respect of this claim. In respect, however, of the other claim for penalties, the Court held that he was not liable, for the particulars of these had not been made known to him. That case, therefore, comes within the rule which I have stated—namely, that the original vendor was only made liable for the natural consequences of a breach of so much of a contract as was made known to him. In the case of *Elbinger Actien-Gesellschafft* v. *Armstrong* (3) the rule was worked out in the same way. There the vendee made a contract with a third person, which was to a great extent made known to the original vendor, so that the vendor knew that if he broke his contract the vendee would be liable to pay damages to the sub-vendee. The only peculiarity of the case was the mode in which the jury estimated the damages, for the exact amount of the penalties was not made known to the vendor, only the fact that if he broke his contract the vendee would be liable to pay damages to the sub-vendee. The Court held that the vendor must pay damages, but that they must not be ascertained by taking the amount of penalties which the vendee had to pay in Russia, and thereupon say that that is the amount of damages which the law determines as payable; but the jury were allowed to look at the amount of the penalties as a means of ascertaining what was a reasonable amount to be paid as damages by the vendor to the vendee. That case, therefore, comes exactly within the same rule as *Borries* v. *Hutchinson* (1), and as the facts were different the rule was applied differently. In the present case the defendants knew that there was a sub-contract with a person in France, and they also knew of the terms of that sub-contract to the extent

that particular sheepskins got up in a particular way were to be delivered at different times. They must, therefore, have known as men of business that if they broke their contract with the vendee by not delivering the skins, he would be liable to pay damages to his customer. I think that Mr. Justice Denman in estimating the damages acted upon the rule which was laid down in *Elbinger Actien-Gesellschafft* v. *Armstrong* (3), and that he did not take into account the damages given by the French Court as the exact amount which he must give, but came to the conclusion that the French Court had in all probability acted reasonably; and therefore, taking that into account, he found as a matter of fact that the sum so given was a reasonable amount of damages. I think that he was entitled to do that, and that in so doing he followed the case of *Elbinger Actien-Gesellschafft* v. *Armstrong* (3). The judgment of the learned Judge was therefore right.

BAGGALLAY, L.J.—I am of the same opinion, and I have nothing to add.

BOWEN, L.J.—I am of the same opinion. The real question is, what is the true measure of damages in this case. A person can only be held responsible for such consequences as the parties may reasonably be supposed to have contemplated at the time when the contract was made. That is the principle laid down in *Hadley* v. *Baxendale* (7), and to be applied to this and other cases. How much of the damages claimed can be reasonably said to have been in the contemplation of the parties at the time when the contract was made depends in every case upon how much of the real situation of the parties was so disclosed at that time by the vendee to the vendor as to render it a fair inference of fact that damages of that class were to be recouped in case there was a breach of the contract, if damages were suffered. Here the vendors knew that a sub-contract had been made by the vendee in France; that the present contract was made with them for the purpose of supplying the goods under the sub-contract, and also that there was no market at which the goods could be bought if they failed to fulfil their contract. They also knew the profit on the sub-contract was to be five francs. The vendors, therefore, at the time of making the contract, knew that if they fulfilled their contract there would be a profit, and that if they broke it there would be a loss; also that as there was no market to which either the vendee or his purchaser could go in order to purchase skins not supplied, the natural inference to be drawn could only be that the vendee would be obliged in some way to make good the loss which the sub-vendee would suffer. There would consequently be a liability, and the sub-contract was not of such a kind as to be got rid of without some injury attaching. The learned Judge, it was admitted, might give the loss of profit, because at the time of making the contract both parties knew that if it was broken there would be such a loss of profit. It seems to me that in a case of this sort, where there is no market to which the parties could go if the contract is broken, the natural result which must have been contemplated at the time of making the original contract was that there would be some liability on the part of the vendee to his sub-purchaser. The limit of that liability must clearly be what the vendee had to pay.

It does not, however, follow that that would necessarily be what he would be entitled to charge the vendor. The learned Judge would have to deal with that in a reasonable way, and would have to give a substantial sum, but not one which would exceed the amount paid by the vendee to his sub-purchaser. He thought the sum of 28*l.* which had been paid was not too much; and therefore treated the case exactly as Mr. Justice Blackburn did in *Elbinger Actien-Gesellschafft* v. *Armstrong* (3), where he said, "If the Judge had told the jury expressly that the penalties as such could not be recovered, but that the plaintiffs were entitled to such damage as in their opinion would be fair compensation for the loss which would naturally arise from the delay, including therein the probable liability of the plaintiffs to damages by reason of the breach through the defendant's default of that contract to which, as both parties knew, the defendant's contract with the plaintiffs was subsidiary, the direction would not at all events have

been too unfavourable to the defendant." Mr. Justice Blackburn then pointed out that where there is no market the question must be treated as a substantial matter of business, and therefore, if a breach of the contract takes place, it is a natural result to be anticipated that the vendee would incur liability to his sub-purchaser. That seems to me to prove that Mr. Justice Blackburn thought the matter one in which no exact rule as to the measure of damages could be laid down beyond that which he laid down, and this follows from the next passage in his judgment, in which he justified the verdict by saying that he did not think it was unreasonable. Can it therefore be said in this case that 28*l.* was, under the circumstances, an unreasonable amount when it was certain the vendee would, as a matter of business, incur, and did actually suffer, that amount of damage. This case must be decided by the decision in *Elbinger Actien-Gesellschafft* v. *Armstrong* (3). As to *Borries* v. *Hutchinson* (1), I will say nothing, except that I am not prepared to say that it is irreconcilable either with the present case or with *Elbinger Actien-Gesellschafft* v. *Armstrong* (3). It is enough to say that either it is reconcilable with the latter case, or if not, then the latter case ought to prevail, for the principles there laid down are clear and sound.

Appeal dismissed.

Solicitors—Adolphus Selim, for plaintiff; A. Poland, for defendant.

1885. March 31. } KNIGHT (*appellant*) *v.* BOWERS (*respondent*).

Sale of Food and Drugs Acts (38 & 39 *Vict. c.* 63, *and* 42 & 43 *Vict. c.* 30)—*Sale of Drug not of the nature demanded by Purchaser—Absence of Adulteration.*

[For the report of the above case, see 54 Law J. Rep. M.C. 108.]

[IN THE COURT OF APPEAL.]

1884. Dec. 16. } GARDNER AND SONS *v.* TRECHMANN.*

Ship and Shipping—Charter-party—Bill of Lading—Incorporation of Terms of Charter-party—Inconsistent Clauses—Freight—Lien.

Certain goods were shipped on board the defendant's ship under a bill of lading by which they were made deliverable at the port of discharge to the plaintiffs, the consignees, the freight to be payable on delivery at the rate of 22*s.* 6*d. per ton, and all other expenses were to be borne by the receivers, "and other conditions as per charter-party." The charter-party, which provided for payment of freight at the rate of* 1*l.* 11*s.* 3*d. per ton, contained a clause giving the shipowner "an absolute lien on the cargo for freight, dead freight, demurrage, lighterage at port of discharge, and average." There was a further clause under which the captain was to sign bills of lading at any rate of freight, "but should the total freight as per bills of lading be under the amount estimated to be earned by this charter, the captain to demand payment of any difference in advance." When the ship arrived at the port of discharge, the shipowner claimed payment of the freight specified in the charter-party, and the plaintiffs, the consignees, in order to obtain delivery of the cargo, which had been detained by the defendant under sections* 193 *and* 194 *of the Mersey Docks Acts Consolidation Act,* 1858, *were compelled to pay the difference between the freight specified in the bill of lading and the charter-party freight. In an action to recover the amount so paid,*— Held, *that the shipowner had no right of lien for the charter-party freight, inasmuch as the clause in the charter-party as to the payment of freight was inconsistent with the contract as to the payment of freight contained in the bill of lading, and therefore could not be incorporated into the bill of lading, and that the plaintiffs were only liable for the amount of freight specified in the bill of lading.*

Appeal from a judgment of Baggallay, L.J., at the trial at Liverpool.

* *Coram* Brett, M.R., Cotton, L.J., and Lindley, L.J.

Gardner v. *Trechmann, App.*

By a charter-party dated the 23rd of July, 1883, and made between the defendant, who was the owner of the British iron steamship *Amanda*, and Berthold Smith & Co., of Taganrog, it was agreed that the *Amanda* should proceed to a safe port in the Sea of Azoff, and there load a full and complete cargo of wheat and/or seed and/or grain and/or tallow and/or other stowage goods, at the option of the freighters, to a safe port in the United Kingdom, on payment of freight at the rate of 1*l.* 11*s.* 3*d.* per ton. The 16th clause of the charter-party provided: "the freighters' liability on this charter to cease when the cargo is shipped (provided the same is worth the freight, dead freight, and demurrage on arrival at port of discharge), the owner or his agent having an absolute lien on the cargo for freight, dead freight, demurrage, lighterage at port of discharge, and average." There was also a clause in the charter-party which provided: "it is further agreed the captain to sign bills of lading as presented and at any rate of freight, but should the total freight as per bills of lading be under the amount estimated to be earned by this charter, the captain to demand payment of any difference in advance; on the other hand, any difference in excess of chartered freight to be deducted by charterer's agents at port of discharge."

The *Amanda* having duly proceeded to Taganrog, there shipped a cargo of wood, part of which—namely, 750 tons of boxwood—was made deliverable, under a bill of lading signed by her captain, to the plaintiffs, "freight for the said goods payable on delivery at the rate of 22*s.* 6*d.* per ton of 2,240 lbs. delivered, immediately in cash without discount, with average accustomed." The bill of lading also contained a clause which provided "all extra expenses in discharging to be borne by receivers, and other conditions as per charter-party dated the 23rd of July, 1883." When the *Amanda* arrived at Liverpool, the defendant on discharging her cargo demanded payment of freight at the rate specified in the charter-party, and to obtain this caused a portion of the cargo included in the plaintiffs' bill of lading to be detained under sections 193 and 194 of the Mersey Docks Acts Consolidation Act, 1858 (21 & 22 Vict. c. xcii.). The plaintiffs having paid 99*l.* beyond the amount of freight payable under their bill of lading, in order to get possession of this portion of the cargo, brought the present action to recover that amount.

Baggallay, L.J., gave judgment for the defendant.

The plaintiffs appealed.

Gorell Barnes, for the plaintiffs.—The question is whether the consignees of the goods under the bill of lading are bound to pay not the freight specifically mentioned in the bill of lading, but the charter-party freight. The shipowner cannot have a lien for freight which under the contract is payable in advance. The question depends upon the construction of the documents. There is no authority precisely in point, and the first case is that of *Chappel* v. *Comfort* (1). Baggallay, L.J., based his judgment upon *Gray* v. *Carr* (2) and *Porteous* v. *Watney* (3); but those authorities do not support his decision. *Porteous* v. *Watney* (3) turned upon the particular words in the bill of lading. The words "other conditions as per charter-party" merely mean that only the conditions in the charter-party are to be incorporated into the bill of lading so far as they are not inconsistent with the contract contained in the latter document. The clauses in the bill of lading which incorporate those in the charter-party must be strictly construed; and here they are wholly inconsistent. The lien which the defendant claims to exercise is in respect of freight which the captain was bound to get in advance. The clause which gives a lien for the charter-party freight is not incorporated in the bill of lading. The shippers here stipulated that where the charter-party and the bill of lading differ, the latter document must prevail, and the charter-party in such a case cannot override the bill of lading—*Gullichsen* v. *Stewart* (4). The case of *Fry* v. *The Chartered*

(1) 10 Com. B. Rep. N.S. 802; 31 Law J. Rep. C.P. 58.

(2) 40 Law J. Rep. Q.B. 257; Law Rep. 6 Q.B. 522.

(3) 47 Law J. Rep. Q.B. 365; Law Rep. 3 Q.B. D. 227, 534.

(4) 53 Law J. Rep. Q.B. 173; Law Rep. 13 Q.B. D. 317.

Mercantile Bank of India (5) shews that only the freight applicable to the particular goods mentioned in the bill of lading, and not the whole freight under the charter-party, is payable. It never was intended that the shipowner should have a lien for freight which the captain ought to have obtained payment for in advance.

French, for the defendant.—The effect of the clause is that the shipper of the goods has notice of the terms of the charter-party; he himself receives the bill of lading which incorporates the conditions contained in the charter-party, and therefore knows exactly the terms upon which he is dealing and the measure of his liability. The case of *Gullichsen* v. *Stewart* (4) is distinguishable, for there it was held that the consignees of the cargo were not protected by the charter-party. In this case the consignees seek to put in force against the shipowner the provisions contained in the bill of lading. The cases have not gone the length of deciding that a general reference in a bill of lading to the terms of the charter-party incorporates into the bill of lading only such stipulations in the charter-party as are consistent with the contract contained in the bill of lading.

BRETT, M.R.—In this case the plaintiffs' goods were shipped on board the defendant's ship and brought to England. The shipowner assumed to hold those goods in respect of an alleged right of lien for the difference between the amount of freight payable under the bill of lading and that payable under the charter-party. In the first place I am of opinion that the charter-party gave no such right of lien for the difference. The charter-party gave him a right to immediate payment before the ship sailed of any difference between the freight payable under the bill of lading and that payable under the charter-party. That excess of freight was to be demanded by the captain, and consequently the shipowner had no right of lien for that excess even as against the charterer. The stipulation merely reserved a right which could not be enforced by lien by the shipowner.

(5) 35 Law J. Rep. C.P. 306; Law Rep. 1 C.P. 689.

Secondly, I am of opinion that even if the charter-party gave a right of lien for this excess of freight, that right is not incorporated into the bill of lading, and the claim is ousted by the fact of the captain having signed the bill of lading.

There have been many controversial cases as to the meaning of the words "other conditions as per charter-party"; but they all come to this, that that reference in the bill of lading to the charter-party only incorporates into the bill of lading those stipulations in the charter-party which are applicable to the contract contained in the bill of lading. No stipulations contained in the charter-party can be brought into the bill of lading if they would control or alter the specific stipulations in the bill of lading, for these cannot be altered by a general reference to the terms of the charter-party. Here there is a stipulation in the bill of lading that the goods, so far as the freight is concerned, shall be delivered upon payment of the amount of freight therein specified. This amount is fixed without reference to any other amount of freight. The effect of the general reference to the charter-party is to bring into the bill of lading all those stipulations in the charter-party which are not specifically dealt with in the bill of lading, as, for instance, a lien for demurrage; but it does not allow any alteration of the specific stipulation as to delivery, or a lien to be brought in as to the freight payable under the charter-party. The question raised is a difficult one, and it is easy to see how Lord Justice Baggallay came to a conclusion in favour of the defendant; but we are compelled to come to a different conclusion.

COTTON, L.J.—I am of the same opinion. The question depends upon the construction of these two documents. The freight was payable under the bill of lading at a specified rate upon delivery of the goods. The shipowner was not entitled to retain the whole of the cargo shipped in respect of a claim for the amount of freight mentioned in the bill of lading, but the freight was payable on that which was actually delivered. The amount of freight payable under the bill of lading is less than that payable under the charter-party, and the

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question is whether the clause in the charter-party gives a lien to the shipowner for the difference between those two amounts. I do not think it does. Then comes the question whether the words "other conditions as per charter-party" introduce into the bill of lading the clause in the charter-party which gives the shipowner a right of lien in respect of freight payable under the charter-party. I think they do not. Where there is no express provision in the bill of lading the contract is to be regulated by the terms of the charter-party; and only those conditions are to be introduced which apply to the contract contained in the bill of lading. Here there is an express stipulation that the captain is to sign bills of lading as presented, and at any rate of freight; but if the total freight as per bills of lading is under the amount estimated to be earned by the charter, he is to demand payment of any difference in advance. The charter-party is to govern the contract except as to the freight and extra expenses. This construction brings most of the clauses in the charter-party into the bill of lading, but not the clause as to a lien for the charter-party freight.

LINDLEY, L.J.—I am of the same opinion. The whole difficulty has arisen from the captain having failed to enforce the clause in the charter-party as to demanding in advance the difference between the freight payable under the bill of lading and the amount estimated to be earned under the charter-party. The bill of lading is a contract for the conveyance of the goods mentioned in it, and the holders are entitled to delivery of the goods therein mentioned at the specified rate. The course taken by the defendant cannot throw upon the holders the obligation to pay freight for the whole of the cargo when only a portion was delivered. It was contended that the holders of the bill of lading must under the clause at the end of the bill of lading pay the whole of the freight reserved by the charter-party. In my opinion the two clauses as to the payment of freight are wholly inconsistent and cannot stand together. It is no answer to say that the words include something to which they do not apply. The bill of lading only incorporates conditions in the charter-party which are consistent with the contract contained in the bill of lading. *Prima facie* there is no lien for freight payable in advance; such a lien may no doubt be contracted for, but in my opinion the words in question do not give it. The judgment must therefore be entered for the plaintiffs.

Appeal allowed.

Solicitors—Field, Roscoe & Co., agents for Bateson, Bright & Warr, Liverpool, for plaintiffs; Turnbull, Tilly & Mousir, agents for Turnbull & Tilly, West Hartlepool, for defendant.

1885. July 16. ELLIOTT *v.* HALL (*sued as* THE NAILSTONE COLLIERY COMPANY).

Negligence—Supply of Defective Article—Injury to Person using it with whom there was no Contract—Liability for such Injury.

The defendant delivered coals ordered by the plaintiff's employer in a truck hired from the Midland Wagon Company, who repaired it in case of serious defects, the defendant remedying slight defects. When the plaintiff got on the truck to unload it, the trap-door of the truck gave way, owing to a defect in the pin in the door, and the plaintiff, without any contributory negligence on his part, fell through and sustained damage:—Held, *that the defendant was liable for the injury.*

Heaven *v.* Pender (52 Law J. Rep. Q.B. 702) *distinguished.*

This was a motion on behalf of the plaintiff for judgment in an action for damages caused by the defendant's alleged negligence. The plaintiff's employers, the Leicester Coal Consumers' Company, ordered some coals of the defendant, who delivered them in a truck which had been long in his possession, although it was in fact hired from the Midland Wagon Company, who, as the evidence shewed, repaired it when there was any serious defect found, but in case of slight want of repair the defendant repaired it. There

was a trap-door in the bottom of the truck, which was kept up by a horizontal pin with a catch at the end, without which catch the pin was liable to jolt out when the truck was moved. Owing to the fact that this catch was wanting, the plaintiff, while unloading the truck, fell through the trap-door with some half a ton of coals on him, and was injured. At the trial at Leicester before Pollock, B., on the 7th of July, the jury found for the plaintiff, awarding 200*l.* as damages, and negativing contributory negligence on the plaintiff's part.

Sills (with him *Toller*), for the plaintiff. —There was a duty towards the plaintiff to see that the truck which the defendant invited the plaintiff's employer or his servant to use, or which he must have contemplated that he or his servant would use, was a fit and proper chattel for such a use, although there was no express contract between the plaintiff and defendant—*Indermaur* v. *Dames* (1) and *Heaven* v. *Pender* (2).

E. Lumley, for the defendant.—The cases in which there has been held to be a duty to a person with whom there was no contract are either where the defendant was an occupier of premises, who, as such, is bound not to permit a kind of trap to be on those premises whereby even a bare licensee may be injured—*Collis* v. *Selden* (3)—or in respect of the use of explosives or other dangerous chattels—*Levy* v. *Langridge* (4). *Heaven* v. *Pender* (2) is distinguishable. There the staging was under the defendant's direct control. Here, also, there was an interval of six weeks between the time when the truck was last in the defendant's control and the accident, and there was ample time in which the Midland Wagon Company could have discovered the defect, so that the blame rested with that company and not with the defendant, whereas in *Winterbottom* v. *Wright* (5), there was no possible chance of discovering it. The duty of the defendant could not be to all and sundry persons using the truck for an indefinite period of time. In *Heaven* v. *Pender* (2) the question was whether the owner of the dock, who had the control of the staging put up in his dock, was liable: not whether any one, and, if so, who, was liable. Here there was no duty on the part of the defendant towards the plaintiff. The verdict was also against the weight of the evidence, as there was contributory negligence in a man going to stand on a truck not looking beforehand to see if it was safe for him so to do.

GROVE, J.—I think judgment should be for the plaintiff in this case, which has been put to us as being a stronger case than *Heaven* v. *Pender* (2). In that case, however, the judgment was given on a point really different from the question in this. There the only question was whether the dockmaster, who had control of the dock and the appliances, was liable to the plaintiff as well as the person who had put up the staging. That case does not, therefore, appear to be requisite for the plaintiff. Here the question is not whether the Midland Wagon Company is liable, but whether the defendant is liable. The facts are shortly these: The defendant hired a truck from the Midland Wagon Company, which, except in small details, was repaired by that company. In that truck was a trap-door kept up by a pin. This truck was used by the defendant to convey coal which the plaintiff's employers had ordered of the defendant. The defendant knew that this truck must be unloaded, and in fact the buyers employed the plaintiff to unload it. During the course of such employment the accident happened. There is no dispute that the accident happened in consequence of a defect in the pin that kept up the trap-door. The question arises, through whose negligence was there this defect. I have no doubt in my own mind that there was a clear duty lying on the defendant to supply an efficient truck. If a man supplies a vessel in which coals

(1) 36 Law J. Rep. C.P. 181; Law Rep. 2 C.P. 311.
(2) 52 Law J. Rep. Q.B. 702; Law Rep. 11 Q.B. D. 503.
(3) 37 Law J. Rep. C.P. 233; Law Rep. 3 C.P. 495.
(4) 4 Mee. & W. 337; 7 Law J. Rep. Exch. 387.
(5) 10 Mee. & W. 109; 11 Law J. Rep. Exch. 415.

or any other article are sent out, he is bound to see that it is in fair and proper order for the service to which it is to be put: and although he cannot guard against latent defects, he can see that it is in fit and proper order. But it was contended that there was no contract between the plaintiff and the defendant. That may be; but the plaintiff was the servant of the person to whom the coals were supplied, and who the defendant must reasonably have supposed would unload the truck. Another question is, was the pin in a bad state when under the defendant's control. There is evidence that the fracture was of long standing. That was a question for the jury, and they have found it in favour of the plaintiff. It may be true that the truck stayed six weeks at a Midland Station, where it was the duty of the Midland Wagon Company to have inspected it, and, if necessary, repaired it; but the question here is not as to the liability of the Midland Wagon Company, but of the defendant.

There was reasonable evidence which the jury might believe, that the fracture was of long standing—long enough to have been known to the defendant. This case differs from that of *Indermaur* v. *Dames* (1), where the plaintiff was a mere licensee and the defendants were held liable as for having set a trap for the plaintiff. Here the plaintiff was a person who the defendant must have known would use the truck, and the defendant ought to have been prepared against what was certain to happen.

SMITH, J.—I am of the same opinion. It was argued that the defendant was not the owner of the truck; but it had been in his possession for years, and there was evidence that it was his duty to inspect it, although any defects found were, in fact, repaired by the owners. There was evidence which the jury might reasonably believe that the accident was caused owing to the insecurity arising from the defect in the pin, and that if due care had been exercised by the defendant's servants they would have discovered this. The jury also found that there was no contributory negligence.

It is, however, said that there was no duty cast on the defendant towards the plaintiff to take due and proper care. I think there was. What was the position of the plaintiff? He is not one of the public, not a bare licensee, not a stranger, but a person whose duty it was to unload that truck. The defendant sent the truck with coal to the plaintiff for the purpose of being unloaded by him or his servants. How can it be said that no duty lay on the defendant towards the plaintiff? And I cannot see how the duty once lying on him, in face of the evidence that the pin had been out of order much longer than six weeks, the fact of the truck being at Bagsworth Station for six weeks would make any difference. It is not correct to say, as counsel for the defendant contended, that the cases where the duty has been held to exist are limited to occupiers of property or premises, or cases of dangerous materials. In the case of *Foulkes* v. *The Metropolitan Railway Company* (6) it was held that there was a duty to the plaintiff, although he had no ticket, since by providing the carriages the company held out an invitation to passengers to use them.

Judgment must therefore be for the plaintiff.

Judgment for plaintiff.

Solicitors — Rodgers & Clarkson, agents for Hincks & Topham, Leicester, for plaintiff; Crowder, Anstie & Vizard, agents for Owston, Dickinson & Simpson, Leicester, for defendant.

1885. June 19, 23. } DANIEL (*appellant*) *v.* WHITFIELD (*respondent*).

Baker or Seller of Bread—Duty to have Scales in Cart—Bread weighed in shop in Purchaser's presence, and sent out to oblige the Purchaser—6 & 7 Will. 4. c. 37. s. 7.

[For the report of the above case, see 54 Law J. Rep. M.C. 134.]

(6) 4 Law J. Rep. C.P. 361; Law Rep. 5 C.P. D. 157.

1885.
May 7.
June 15, 23.

VOINET AND ANOTHER *v.* BARRETT AND OTHERS.

Estoppel—Foreign Judgment—Defendant not resident in, nor a Subject of the Foreign Country—Appearance to protect Property from Seizure in case of Judgment by Default.

It is no answer to an action upon the judgment of a foreign Court that at the time of the proceedings in the foreign Court the defendant was not resident or domiciled or under allegiance in the foreign country and appeared in the foreign Court as defendant merely to protect his property from seizure in case judgment by default should be given against him in the foreign Court.

There is no difference between a case where the object of the defendant in appearing is to protect property actually seized and a case in which his object is to protect property which may become liable to seizure.

De Cosse Brissac *v.* Rathbone (6 Hurl. & N. 301; 30 Law J. Rep. Exch. 238) *followed.*

Dictum of PARKE, B., *in* The General Steam Navigation Company *v.* Guillon (11 Mee. & W. 877, at p. 894; 13 Law J. Rep. Exch. 168, at p. 176) *dissented from.*

Schibsby *v.* Westenholz (40 Law J. Rep. Q.B. 73; Law Rep. 6 Q.B. 155) *questioned.*

Action tried in Middlesex before Wills, J., without a jury.

Abrahams, for the plaintiffs.

Bompas, Q.C., and *W. H. Clay*, for the defendants.

In addition to the cases referred to in the judgment *Godard* v. *Gray* (1) and *Meyer* v. *Ralli* (2) were cited during the arguments.

WILLS, J.—This is an action upon a French judgment of the Court of Commerce at Besançon, by which the plaintiffs recovered against the defendants a sum of 367*l.*

The action was commenced in the French Court at Besançon by process which issued from that Court on the 6th of February, 1879. The defendants, who were Englishmen domiciled and carrying on business in this country and not in France, appeared to this process, which had been served upon them personally in London. There was no property of the defendants in the hands of the Court under any process of arrest or otherwise, but they had large business transactions with French houses, and were frequently in such a position that a judgment in a French Court might be executed against their property in France.

On the 28th of June, 1879, the Court of Commerce at Besançon pronounced a judgment appointing M. Barbier, an expert, to enquire into certain questions connected with the matters in dispute. The expert made his report. On the 1st of May, 1880, upon objection by the defendants to M. Barbier's report, the Court directed a fresh *expertise*, and requested the *Tribunal Civil de la Seine* of Paris to nominate three experts to proceed to a fresh enquiry. On the 16th of May, 1881, the report of these Parisian experts was, pursuant to the directions given in the judgment of the 1st of May, 1881, deposited at the *Greffe*, or Registry of the Court at Besançon. The report was unfavourable to the defendants, and on the 20th of August, 1881, the judgment now sued upon was pronounced against them in their absence and in default of their appearance.

Now, no further statement of facts is necessary to raise the first contention of the defendants, which was that where a party once appears as a defendant in the Court of a foreign country, and his reason for doing so is that he has property in that country liable to seizure under the process of the foreign Court which he cannot otherwise protect, he is not necessarily, as a consequence of his having appeared in that Court, bound to submit to the judgment of the foreign Court.

The question is certainly not altogether free from doubt, and it is necessary to examine carefully the state of the authorities. They appear to me to be as follows:

(1) 40 Law J. Rep. Q.B. 62; Law Rep. 6 Q.B. 139.

(2) 45 Law J. Rep. C.P. 741; Law Rep. 1 C.P. D. 358.

In the case of *The General Steam Navigation Company* v. *Guillon* (3) the plaintiffs sued the defendant in the English Court for a collision on the high seas. There was a plea, more complicated than I am stating it, which, reduced to its simplest form, so far as the matter now under discussion is concerned, was that the then defendant had sued the then plaintiffs in the French Court for the said collision, and that the then plaintiffs had appeared in the French Court and had had judgment against them. That plea was held bad on special demurrer upon an objection which could not be raised nowadays, but which had its full effect at the time I am speaking of (1843) —namely, that it was substantially a plea of estoppel, and had not a proper formal commencement and conclusion. But the Court took the occasion of expressing an opinion, which, though entitled to great weight, seeing the quarter from which it comes, can hardly under the circumstances be considered more than an *obiter dictum*. Mr. Baron Parke said, "It becomes, therefore, unnecessary to give any opinion whether the pleas are bad in substance; but it is not to be understood that we feel much doubt upon that question. They do not state that the plaintiffs were French subjects, or resiant or even present in France, when the suit began, so as to be bound, by reason of allegiance, or domicile, or temporary presence, by a decision of a French Court; and they did not select the tribunal and sue as plaintiffs; in any of which cases the determination might have possibly bound them. They were mere strangers, who put forward the negligence of the defendant as an answer, in an adverse suit in a foreign country, whose laws they were under no obligation to obey" (4). Undoubtedly the expression of opinion there is that under those circumstances they would not be bound by the judgment of the foreign Court.

The same question, or a question very nearly akin to this, was considered a few years later, in the year 1851, in the case of *The Bank of Australasia* v. *Nias* (5). There the circumstances under which and the extent to which the judgment of a foreign or colonial Court (for they are both put upon the same footing in that respect) is examinable in an action in this country to enforce it were very much discussed. It was held, according to the marginal note, which seems to me to be correct, that although in such an action the judgment is examinable to a certain extent, as for the purpose of shewing want of jurisdiction, or the defendant not summoned, or that the judgment was fraudulently obtained—yet such judgment was not examinable upon the merits, as for the purpose of shewing that the contract sued upon was not made or was procured by fraud, or that the judgment was erroneous. The Court said there, "Doubtless it is open to the defendant to shew that the foreign Court had not jurisdiction of the subject-matter of the suit, or that he never was summoned to answer, and had no opportunity of making his defence, or that the judgment was fraudulently obtained" (6). The case of *The General Steam Navigation Company* v. *Guillon* (3) does not seem to have been quoted or under consideration in that case.

The next case in order of time on this subject was the case of *De Cosse Brissac* v. *Rathbone* (7). That case was decided on demurrer. It was an action on a foreign judgment, and by way of defence it was pleaded that the defendants were subjects of her Majesty the Queen, and were in no way resident, or carrying on business, or domiciled in France, but always in England, and that in the suit in the French Court they had been defendants and not plaintiffs; that they were possessed of property in France which would be liable to seizure in case the judgment went against them in default of appearance, supposing they did not appear; and for that purpose, and in order to prevent their property from being so seized, they authorised an agent

(3) 11 Mee. & W. 877; 13 Law J. Rep. Exch. 168.

(4) 11 Mee. & W. at p. 894; 13 Law J. Rep. Exch. at p. 176.

(5) 16 Q.B. Rep. 717; 20 Law J. Rep. Q.B. 284.

(6) 16 Q.B. Rep. at p. 735; 20 Law J. Rep. Q.B. at p. 292.

(7) 6 Hurl. & N. 301; 30 Law J. Rep. Exch. 238.

to appear for them in the suit in France, and thereupon they did appear. They then go on to say that the judgment upon which the action was founded, and which was then sued upon, was a judgment founded upon a former judgment in one of the Courts in France, and it was given in the same suit for the purpose of carrying out the first-mentioned judgment and fixing the amount of damages for which the defendants were liable upon the first-mentioned judgment. Then they allege that the said first-mentioned judgment, and the said second-mentioned judgment, so far as it is founded upon the first-mentioned judgment, were erroneous in fact and in law, and upon the merits, and that they ought not to have been in favour of the plaintiffs. The Court held there that the question was so concluded by the authorities that it was impossible to decide contrary to them, and their judgment was for the plaintiff, holding that the ground alleged—namely, that the defendant had appeared in the foreign Court so far under duress, that he appeared simply to protect his property from seizure in case an adverse judgment should be given against him by default—was no ground for allowing him to refuse to obey the judgment of the tribunal to which he had submitted. It is to be observed that the case of *The General Steam Navigation Company* v. *Guillon* (3) was quoted in that case, and was under discussion. Therefore, it is impossible to escape from the conclusion that the Court had before them the very question which is now before me, and decided it adversely to the defendant in that suit, and therefore to the defendant in this suit.

Shortly afterwards there came, in the year 1863, the case of *Simpson* v. *Fogo* (8), which was an action upon the judgment of the Court at Louisiana. It was suggested in the course of the argument that it was a judgment *in rem*, because the defendants were mortgagees of the ship in respect of which the action arose; but the Vice-Chancellor (9) points out in the course of his judgment that the ship had been seized under a process analogous to our process of *fi. fa.*, and that it was merely a suit *inter partes*, and therefore the Vice-Chancellor treated the question I am now discussing as concluded by the case of *De Cosse Brissac* v. *Rathbone* (7), and he appears to have entirely concurred in the judgment himself.

Then again, in 1870, there was the case, which has been so much discussed, of *Schibsby* v. *Westenholz* (10). Mr. Justice Blackburn, in delivering the judgment of the Court, sums up what he conceives to be the result of the authorities. I do not know that I should go further into this part of the question, except for the fact that undoubtedly there seems to me to have been a misapprehension, in the course of that judgment, as to what had been decided by some of the cases which were under review. Inasmuch as it is very desirable to clear away any misapprehension of that sort, I think it is only right I should point out how it is that, as it appears to me, there was a misapprehension as to what was decided in the cases of *The General Steam Navigation Company* v. *Guillon* (3) and *De Cosse Brissac* v. *Rathbone* (7) respectively. The learned Judge says, after citing the passage from the case of *The General Steam Navigation Company* v. *Guillon* (3) which I have already read, "It will be seen from this that those very learned Judges, besides expressing an opinion conformable to ours, also expressed one to the effect that the plaintiffs in that suit did not put themselves under an obligation to obey the foreign judgment merely by appearing to defend themselves against it. On the other hand, in *Simpson* v. *Fogo* (8), where the mortgagees of an English ship had come into the Courts of Louisiana to endeavour to prevent the sale of their ship seized under an execution against the mortgagors, and the Courts of Louisiana decided against them, the Vice-Chancellor and the very learned counsel who argued in the case seem all to have taken it for granted that the decision of the Court in Louisiana would have bound the mortgagees had it not been in contemptuous disregard of English law" (that is to say, the Court there, professing to deal with English law, had correctly stated

(8) 1 Hem. & M. 195; 32 Law J. Rep. Chanc. 249.

(9) Sir William Page Wood.

(10) 40 Law J. Rep. Q.B. 73; Law Rep. 6 Q.B. 155.

what they believed to be English law, and then decided against it, although it was said, according to all legal principles, which they admitted, it ought to be decided by English law). "The case of *The General Steam Navigation Company* v. *Guillon* (3) was not referred to, and therefore cannot be considered as dissented from; but it seems clear that they did not agree in the latter part of the opinion there expressed." I have pointed out already that the case of *De Cosse Brissac* v. *Rathbone* (7) was cited and relied upon, and in that case *The General Steam Navigation Company* v. *Guillon* (3) was under discussion, and therefore, although it is not specifically mentioned in the report of the argument, in that sense it is dissented from, because the judgment which had really dissented from it, and which cannot be considered as anything else than a formal judgment dissenting from it, had been followed and approved. The judgment goes on to say, "We think it better to leave this question open, and to express no opinion as to the effect of the appearance of a defendant, where it is so far not voluntary that he only comes in to try to save some property in the hands of the foreign tribunal." Now certainly, unless I misunderstand that sentence in its connection with what goes before, it seems rather to point to the view, that in the case of *Simpson* v. *Fogo* (8) and in the case of *The General Steam Navigation Company* v. *Guillon* (3), in each of those cases the defendant had appeared to try and save property in the hands of the foreign tribunal, and it was decided one way by one decision and the other way by the other. I cannot find in the pleadings in *The General Steam Navigation Company* v. *Guillon* (3) that there was any allegation of that kind, and it seems to me, as far as one can gather from the pleadings in *The General Steam Navigation Company* v. *Guillon* (3), that that was a case, as far as it appears, of a purely voluntary appearance, and under no compulsion or duress, or anything of that kind. "But we must observe," the judgment goes on to say, "that the decision in *De Cosse Brissac* v. *Rathbone* (7) is an authority that where the defendant voluntarily appears and takes the chance of a judgment in his favour, he is bound." I cannot help thinking with Mr. Abrahams, that in that phraseology the voluntary appearance which is attributed to the case of *De Cosse Brissac* v. *Rathbone* (7) really means an appearance voluntary as contradistinguished to one made under that species of duress which consists of the necessity of attempting to save your property from execution if you do not appear at all. Whereas, as I have pointed out, in the case of *De Cosse Brissac* v. *Rathbone* (7) the allegation in the plea was that the defendant had property in France which he wished to save from possible execution, and therefore for that reason he appeared. Therefore, it seems to me rather as if the decisions in the case of *The General Steam Navigation Company* v. *Guillon* (3) and that of *De Cosse Brissac* v. *Rathbone* (7) had been misplaced, and the decision which was really that of the latter case attributed to the former, and that of the former case attributed to the latter. If so, it seems to me to be incorrect to say that that particular question was at that time still undecided, because it seems to me that it is impossible to distinguish the case of *De Cosse Brissac* v. *Rathbone* (7) from the present case, and that it is impossible to deny that in that case it was expressly alleged that the appearance of the defendants was not to save property then in the hands of the tribunal, but, what is nearly as cogent a species of duress, from the necessity of saving other property from execution in case a judgment by default should be obtained in the Court. It seems to me, therefore, that that question really in the year 1870 was not an open question, and it is not an open question now so far as decisions go.

As to the other cases which have been cited, the one which seems to me to have any bearing on the subject is the case of *Duflos* v. *Burlingham* (11) in the year 1876. That was an action on a foreign judgment upon a contract entered into in this country and not elsewhere, and the plea in that action was that before the judgment the defendant was never resident or domiciled or within the jurisdiction of the French Court, nor did he ever owe allegiance to that country, nor was he at

(11) 43 Law Times N.S. 688.

the time of contracting the alleged obligation in France or within the jurisdiction of the Court. That plea was held bad. There is no allegation in that plea that the defendant had not in fact been served, and the plea which alleges that he had not in fact been served or had notice of the action does not allege that he was not for some reason or other bound to obey the judgment of the Court. It certainly does not seem to me to be a judgment upon the main point in question, nor was it contended that it was so, but it was relied upon for an expression of opinion of Mr. Justice Blackburn, who says in the course of the argument, "He says he never owed allegiance to the country. Besides, how could his appearance have rendered the judgment binding upon him under the circumstances stated?" It is a *dictum* which is undoubtedly in favour of the defendants; it does not appear to me to amount to more; and I think, upon all ordinary principles, I am bound by the actual decision, and that I have no right to question it merely because of a *dictum* so expressed in the report of the case.

It appears to me, therefore, that upon the first question the matter is concluded by authority, and that it is the law, until altered by competent authority, that where a defendant appears in the foreign Court and takes his chance of a judgment in his favour, although he appears in consequence of the duress of wishing to protect his property there which is in the hands of the Court, or which will become liable to seizure in case he does not appear, he cannot afterwards say that he is not bound to submit to a judgment obtained under those circumstances. I cannot see why, in principle, there should be any difference between a case where the object is to protect property actually seized, and a case where the object is to preserve property which may become subject to seizure. They seem to me to stand upon the same footing, and I come to the conclusion upon this point that really the case of *The General Steam Navigation Company* v. *Guillon* (3) is no longer law, and that upon the authorities I am bound to hold that the mere fact that the defendant appears under those circumstances does not exempt him from the duty of obeying the judgment of the Court if he has once submitted to its jurisdiction. [His Lordship then reviewed the evidence as to the procedure in the French Court, and the circumstances under which the judgment was obtained against the defendants, and, having come to the conclusion that under the circumstances of the case there were facts which (according to the phraseology adopted in *Schibsby* v. *Westenholz* (10)) constituted a legal and valid excuse to the defendants for refusing to be bound by the judgment obtained against them in the French Court, gave judgment for the defendants, with costs.]

Solicitors—Napoleon Argles, for plaintiffs; G. H. Hall, for defendants.

1885. June 22. } SIBLEY *v.* HIGGS (TAPLIN *claimant*).

Bill of Sale—45 & 46 *Vict. c.* 43. *s.* 9—*Non-accordance with Scheduled Form*—*Time of Payment.*

By a bill of sale the grantor agreed that if he should not duly pay to his creditors a certain instalment of a composition on the 24th of May, 1883, *and the grantee should, under a guarantee given by him, be obliged to pay the same, he the grantor would repay that sum to the grantee within seven days after demand; and a power of seizure on default was given*:—Held, *that the bill of sale was void as not being in accordance with the form in the schedule to* 45 & 46 *Vict. c.* 43, *as to the stipulating of a time for payment.*

Rule *nisi* to set aside a decision in an interpleader proceeding between an execution creditor in a County Court action and a claimant under a bill of sale. The bill of sale (so far as material to be here stated) was as follows:—

"This indenture made on the 20th of April, 1883, between Charles Higgs, mortgagor, and George Taplin, mortgagee: Whereas the mortgagor has applied to the mortgagee to be and become security and guarantee for him the mortgagor in the

sum of 65*l.* 16*s.* 3*d.*, being an instalment of a composition due by the mortgagor to his creditors, which the mortgagee has agreed to do upon having the security hereinafter contained: Now this indenture witnesseth, that in consideration of the mortgagee becoming security for the mortgagor in the sum of 65*l.* 16*s.* 3*d.*, he the mortgagor doth hereby assign unto the mortgagee all the chattels described in the schedule by way of security for payment of the said sum by the mortgagor to his creditors, and as security and indemnity to the mortgagee for the said sum of 65*s.* 16*s.* 3*d.* for which he has become liable under his said guarantee; and the said mortgagor doth further agree and declare that he will duly pay the said sum of 65*l.* 16*s.* 3*d.* to his creditors on the 24th of May, 1883. Provided always, and it is hereby agreed and declared by the said mortgagor, that if he the said mortgagor should not duly pay the said sum on the 24th of May, 1883, and that the mortgagee should be obliged to pay the same under the said guarantee, then and in that case the said mortgagor shall repay to the said mortgagee the said sum of 65*l.* 16*s.* 3*d.* within seven days after demand in writing, such demand to be sent by post to the last known address of the mortgagor: And further, in case the mortgagor shall make default in payment of the said sum, or any part thereof, hereinbefore provided for payment, or in the performance of any covenants herein contained, or if he shall become bankrupt, or if any execution shall have been levied against the goods of the mortgagor, it shall be lawful for the mortgagee, his servants or agents, to . . . seize and take possession of the said chattels and things, and after the expiration of five clear days after so taking possession to sell the same. . . ."

The County Court Judge held that the bill of sale was valid notwithstanding that it contained a power of seizure for default in making a payment the time for which was not more exactly specified, and gave judgment for the claimant. This rule having been obtained on behalf of the execution creditor,

W. E. Ball, for the claimant, shewed cause.—The decision of the County Court Judge was correct. *Hetherington* v. *Groom* (1) is distinguishable. There the bill of sale gave power to seize in default of payment on demand; here payment was dependent on the contingency of failure by the mortgagor to pay an instalment of a composition payable to his creditors; until the 24th of May, 1883, there could be no seizure.

R. M. Bray, for the execution creditor, was not called upon to support the rule.

FIELD, J.—To my regret I feel that we must give Mr. Bray's client the benefit of the objection taken on his behalf to this bill of sale. The case is in principle covered by *Hetherington* v. *Groom* (1); and that decision would be binding upon me even if I dissented from it, which I do not.

The Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), says, by section 7: "Personal chattels, assigned under a bill of sale, shall not be liable to be seized or taken possession of by the grantee for any other than the following causes," the first of which is: "if the grantor shall make default in payment of the sum or sums of money thereby secured at the time therein provided for payment. . . ." And section 9 says: "A bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule to this Act annexed." What do we find in the form contained in the schedule? We find this clause: "And the said A. B. doth further agree and declare that he will duly pay to the said C. D. the principal sum aforesaid, together with the interest then due, by equal payments of £ on the day of [or whatever else may be the stipulated times or time of payment]." In *Hetherington* v. *Groom* (1) the Court of Appeal held that those words required that there must be in the bill of sale a stipulated time of payment. There payment was to be made upon demand in writing; and the judgment of the Master of the Rolls and Lord Justice Fry said:

(1) 53 Law J. Rep. Q.B. 576; Law Rep. 13 Q.B. D. 789.

Sibley v. *Higgs.*

"Is a payment on demand a payment at the time in the bill of sale provided for or thereby stipulated? The words of the statute and the schedule are perhaps not clear—they may well include a time fixed by reference to any known event; they may perhaps include a time to be ascertained by the happening of some contingency, but they do not in our opinion include a time to be ascertained by nothing but the mere choice and volition of the holder of the bill of sale. To leave the time of payment at his unfettered choice is not, we think, within the meaning of the 7th section of the statute, to provide in the bill of sale a time for payment, or, within the meaning of the schedule, to ascertain the time by stipulation." Lord Justice Bowen, while doubting the correctness of the view taken by the Master of the Rolls and Lord Justice Fry on certain points, agreed that the bill of sale was bad as giving a power to seize and sell in default of payment on demand. In the present case, no doubt, payment is to be made a certain time after demand; but that, I think, as has already been held, in an unreported case, by my brother Manisty, makes no difference. Then Mr. Ball urges that there could not be any seizure until the 24th of May, 1883. I am of opinion, however, that the case must be held to be within the mischief intended to be provided against. After the 24th of May, 1883, the time of payment depended merely on the volition of the mortgagee: and the case accordingly falls within the principle of *Hetherington* v. *Groom* (1).

MANISTY, J., concurred.

Rule absolute.

Solicitors—W. T. Boydell, for execution creditor; Bower, Cotton & Bower, agents for T. J. Broad, Watford, for claimant.

1885. July 9. WALTER NUTTER AND COMPANY v. MESSAGERIES MARITIMES DE FRANCE.

Practice—Service of Writ of Summons—Foreign Corporation—Order IX. rule 8 *—"Officer"—"Clerk."*

The defendant company, having head offices in Paris, Bordeaux, and Marseilles, had agents and correspondents, among other places, in London. Service of a writ of summons on an agent in London was set aside on the ground that it was not service on the "head officer, clerk, treasurer, or secretary of such corporation," within Order IX. rule 8.

This was a motion to set aside a writ served on the agent of the defendant company in London, the said company having their seat in Paris and their working directorate at Marseilles. In London, according to the prospectus, the firm of Gellatly, Hankey & Co. are the defendants' sub-agents for freight, their London agent being M. Bertrand, Cannon Street, but the plaintiffs had for some time made shipments through Gellatly & Co. The shipment was made at Antwerp, and the bill of lading dated Antwerp, the goods being consigned to a port in China.

F. Gorell Barnes, for the defendants, in support of the motion.—Order IX. rule 8 (1) is the same in effect as the Common Law Procedure Act, section 16 (2), under which foreign corporations could not be sued in these Courts, as they could not be served here; and in this case the contract was made at Antwerp, and the breach occurred in China. If this company could be sued here, they might be sued in 150

(1) Order IX. rule 8: "In the absence of any statutory provision regulating service of process, every writ of summons issued against a corporation aggregate may be served on the mayor or other head officer, or on the town clerk, clerk, treasurer, or secretary of such corporation. . . ."

(2) 15 & 16 Vict. c. 76. s. 16: "Every writ of summons issued against a corporation aggregate may be served on the mayor or other head officer, or on the town clerk, clerk, treasurer, or secretary of such corporation. . . ."

places in all parts of the world. This company has no domicil here.

Myburgh, Q.C., for the plaintiffs.—The company carry on business here by their agent, who can be served. He is for this purpose "head officer" or "clerk" —Order IX. rule 8 (1). That is the proper way of serving a corporation, and a foreign corporation can be so sued— *Newby* v. *Van Oppen and Others* (3).

LORD COLERIDGE, C.J.—If there had not been any authority the other way I should have thought that Order IX. rule 8 (1) did not apply to foreign corporations. At any rate, it seems clear to me that the words of the rule must be followed strictly, in order to avoid, if possible, the obvious inconveniences of suing foreign corporations. The provisions of the rule are: "every writ of summons issued against a corporation aggregate may be served on the mayor or other head officer, or on the town clerk, clerk, treasurer, or secretary of such corporation." The expression, *the* clerk or secretary, clearly points to some single and definite person. A corporation may have many head offices, but the person to be served must be, to adopt the definition of Lord Blackburn, "an individual person whose knowledge may be taken to be the knowledge of the corporation."

It is a condition precedent to a good service that the corporation must either have a domicil in this country, or a distinct place where the business of the company is carried on by a person answering to this description. The service must be upon one single officer or clerk of the corporation. From the affidavits I cannot see that M. Bertrand is such a person. The question is, are the conditions precedent fulfilled in this case. If we look at the prospectus of this company we find that it has head offices in Paris, Marseilles, and Bordeaux; but as to other places, including Cannon Street, it has agents, sub-agents, or correspondents; and it does not follow that because they have an agent who has an office here they themselves can be held to have an office in this country. This case appears to me to come within the hypothetical case in Lord Blackburn's judgment in the case of *Newby* v. *Van Oppen and Others* (3), of an agent employed by a foreign company making a contract for that company, which, however, has not actually a place of business and does not trade in this country.

The judgment of Lord St. Leonards, with which, as regards the law, the House of Lords agreed, though they differed from him as to his view of the facts, in the case of *The Carron Iron Company* v. *Maclaren* (4), was that the corporation in question could be sued on the ground that in respect of their place of business in this country they had a domicil in England; but he did not contemplate a foreign corporation being capable of being sued who have no more distinctive office in this country than in the numerous other places (some hundred and fifty or so) all over the world in which they have agents; and the mere fact of the company having an agent in this country is not sufficient to enable it to be sued by means of service of the writ on such a person. The motion to set aside the writ must therefore be allowed.

SMITH, J.—I am of the same opinion. It must be conceded that unless the service is allowed by Order IX. rule 8 (1) it is bad. It is said to be good service because the writ has been served on the defendants' agents here. The words of the rule are clear—the writ of summons may be served on the head officer of the corporation. The question is, is M. Bertrand such a head officer. If we assume that this company carries on business in London elsewhere than in Cannon Street, and M. Bertrand is their agent in Cannon Street, there is no question that the service on M. Bertrand would be bad; why should it be good because instead of carrying on business elsewhere in London they carry it on in Paris where their head offices are? The affidavit of M. Bertrand himself shews that he is not a head officer, his duties being merely to give information, answer enquiries, and forward goods.

The case of *The Carron Iron Company* v. *Maclaren* (4) does not affect this case,

(3) 41 Law J. Rep. Q.B. 148; Law Rep 7 Q.B. 293.

(4) 5 H.L. Cas. 416.

as the service there was held to be good, on the ground that the defendants had practically a head office in this country by carrying on business here.

Application granted. Service of writ , set aside, with costs.

Solicitors—Gellatly, Son & Warton, for plaintiffs; Harwood & Stephenson, for defendants.

[IN THE COURT OF APPEAL.]

BANKRUPTCY. 1885. May 15, 22.

LINTON *v.* LINTON.*

Bankruptcy—Proof—"Future Debt or Liability"—Alimony—Order for Weekly Payments—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 37—*Divorce Act*, 1866 (29 & 30 *Vict. c.* 32), *s.* 1—*Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 5.

A liability to pay alimony in weekly sums by an order made in divorce under section 1 *of* 29 & 30 *Vict. c.* 32, *is not a "future debt or liability" provable in bankruptcy under the Bankruptcy Act*, 1883, *s.* 37, *sub-s.* 3; *and, notwithstanding the bankruptcy of the person liable, payment may be enforced as of a debt due in pursuance of an order of a competent Court under section* 5 *of the Debtors Act.*

Appeal from an order of Cave, J., ordering the respondent to pay the sum of 12*l.* on the 1st of May, 1885, or be committed to prison.

In the Probate, Divorce, and Admiralty Division in February, 1883, an order had been made embodying the terms of the settlement of the wife's petition for a judicial separation, and ordering, among other things, that the respondent should pay to the petitioner permanent alimony at the rate of 1*l.* 15*s.* per week, payable monthly.

On the 21st of November, 1883, the terms of settlement were, on the petitioner's application, made an order of Court in the Queen's Bench Division.

The payments of alimony fell into arrear, and on the 16th of May, 1884, the respondent was adjudicated bankrupt. The petitioner proved in the bankruptcy for the arrears of alimony down to the bankruptcy, and the costs of the petition. In respect of arrears accruing since the bankruptcy, she took out the judgment summons, on which the order appealed from was made.

C. Willis, Q.C., and *F. C. Willis*, for the respondent appealing.—The order for alimony constitutes a "debt or liability" to which the debtor is subject—section 37, sub-section 3, of the Bankruptcy Act, 1883. The petitioner's only remedy is to prove for the debt—section 9, sub-section 1. Under the corresponding section 31 of the Bankruptcy Act, 1869, it was held that an annuity payable by husband to wife by a separation deed was provable—*Ex parte Neal; in re Batey* (1). If the alimony do not amount to a debt within the Bankruptcy Act, it is not a debt within the Debtors Act.

Y. Lee, for the petitioner.—As to the last point, section 5 of the Debtors Act applies expressly to "default in payment of any debt due in pursuance of an order of a competent Court." It has been held that alimony is not a provable debt in bankruptcy—*Prescott* v. *Prescott* (2); and arrears cannot be recovered by action—*Bailey* v. *Bailey* (3). Alimony is not alienable—*In re Robinson* (4).

Willis, Q.C., in reply.

BRETT, M.R.—In this case an order had been made upon the bankrupt to pay weekly alimony to his wife, and it seems that he made up his mind to disobey it the moment it was made. His payments were in arrear, and he was adjudicated bankrupt on his own petition. It is said for him that his wife must prove in the bankruptcy for the arrears and for the

* *Coram* Brett, M.R., Baggallay, L.J., and Bowen, L.J.

(1) Law Rep. 14 Ch. D. 579.
(2) 20 Law Times, 331.
(3) 53 Law J. Rep. Q.B. 583; Law Rep. 13 Q.B. D. 885.
(4) 53 Law J. Rep. Chanc. 986; Law Rep. 27 Ch. D. 160.

future alimony, and a summons has been taken out to attach him for not paying. The question is raised whether an order to pay alimony is got rid of by bankruptcy; and in my opinion it is a disgraceful attempt to avoid the order. Is it successful? The order was made under the 29 Vict. c. 32. s. 1. That statute recites the previous powers of the Court to order a gross or yearly sum to be paid, and that sometimes the husband has no property to secure such a sum, but would be able to make a monthly or weekly payment. It then provides that the Court may make an order on the husband for payment to the wife during their joint lives of such monthly or weekly sums for her maintenance and support as the Court may think reasonable. There is no power to order a gross sum to be paid under this section; it is only a weekly sum, and the order may be varied according to the ability of the husband. This is alimony out of the husband's personal earnings. These earnings after a bankruptcy do not vest in the trustee, so that he will be precisely as able to pay after his bankruptcy as he was before. The order takes nothing from the creditors in respect of future payments, and if the alimony is not paid to the wife it goes into the bankrupt's own pocket, and he thus sets the Court of Divorce at defiance. If that were the effect of the statutes, it could be only by an accidental oversight. The only ground for supposing that there is this wickedness in the statutes is the suggestion that future payments can be proved in bankruptcy; but the matter does not depend on the peculiar words used in the Bankruptcy Act. Future alimony, in fact, is incapable of being valued. It is not an annuity which can be valued. It was not intended by the Divorce Court that this order should be interfered with, and it is not affected by the bankruptcy. The means of the bankrupt were sufficient to oblige him to pay, and the appeal wholly and righteously fails.

BAGGALLAY, L.J.—I am of the same opinion. The substantial question is whether alimony is provable within the 3rd sub-section under "all future liabilities." I think it is not, and Mr. Justice Byles held the same in *Prescott* v. *Prescott* (2). The alimony may be varied from time to time, and withdrawn or increased: so that there is no means of putting a value upon it. It is different in regard to the arrears at the date of the bankruptcy; but the order is not in the nature of an annuity or a fixed amount.

BOWEN, L.J.—I am of the same opinion. Arrears of alimony are "debts due in pursuance of an order of a competent Court" within the Debtors Act. They were previously enforced under 20 & 21 Vict. Since then that section becomes inapplicable, and section 5 of the Debtors Act is the only way of enforcing them. That is, I think, not too wide a construction of section 5. Alimony is not "a debt due at law," as we held in *Bailey* v. *Bailey* (3); but if authority be wanted that it is a debt within the Debtors Act, it is supplied by the judgment of Lord Justice James in *Hewetson* v. *Sherwin* (5). It is not, strictly speaking, a debt at common law. The question remains, whether the bankrupt is absolved from the obligation of maintaining his wife by his bankruptcy. That result would, I think, be absurd. *Prescott* v. *Prescott* (2) is an authority the other way, although decided under a different Act. The case of *In re Robinson* (4) explains the character of alimony. No doubt some future debts must be estimated as matter of opinion without certainty, but this debt cannot be estimated at all. This is shewn by the fact that if it were allowed to be proved in the bankruptcy, the wife could at once go to the Divorce Court and obtain a fresh order.

Appeal dismissed.

Solicitors—Field, Roscoe & Co., for petitioner; W. G. Place, Leicester, for respondent.

(5) Law Rep. 10 Eq. 53.

[IN THE HOUSE OF LORDS.]

1885. Feb. 23, 24. SIR R. BURNETT, BARONET, *v.* THE GREAT NORTH OF SCOTLAND RAILWAY COMPANY.

Railway Company — "Passenger Trains"—Contract with Landowner to stop.

A proprietor of land in Scotland granted to a railway company at a nominal feu rent a piece of ground for the erection of a station at C. The feu charter contained a provision that all "passenger trains" should regularly stop at the station to be erected.

The company subsequently claimed the right to run through without stopping trains of the following three descriptions: —1. *Special excursion trains not advertised as running regularly in the company's time tables;* 2. *Trains known as Queen's Messenger trains;* 3. *Trains known as Post Office trains. Queen's Messenger and Post Office trains were run only while the Queen was at Balmoral, by arrangement with the Home Office and Post Office respectively, who paid the company subsidies. They were advertised in the company's time-tables, and conveyed passengers other than those going to and from Balmoral. There was no stipulation in the contracts with the Home Office and Post Office that the trains should not stop at C.:—*

Held, *reversing the decision of the Court of Session, that the Queen's Messenger trains and Post Office trains were "passenger trains," and were bound by the contract. But* Held *by the* EARL OF SELBORNE, L.C., LORD WATSON, *and* LORD FITZGERALD (*dissentiente* LORD BRAMWELL), *that the contract did not apply to the special excursion trains.*

This was an appeal from a decision of the Second Division of the Court of Session in Scotland (reported 11 Sess. Cas. 4th ser. 375), which affirmed one of the Lord Ordinary. The action was brought by the appellant, proprietor of the estates of Leys and Crathes, Kincardine, under the following circumstances:—

By an agreement, dated the 24th of January, 1853, between Sir Alexander Burnett, Bart. (predecessor in title of the appellant), and the Deeside Railway Company (which was afterwards merged in the respondent company), the Deeside Railway Company agreed, amongst other things, to construct a siding at Crathes, near the present station, "for the accommodation of the proprietor and tenants of the estate of Leys," and undertook that any of the passenger trains should be stopped at the said siding by signal to take up or set down passengers from or to Crathes.

By a feu charter, dated the 27th of March, 1863, Sir James Horn Burnett, Bart., successor and heir-at-law of Sir Alexander Burnett, reciting that the Deeside Railway Company had agreed to build on the ground thereby disponed a station for passengers and goods (which would be of advantage to him and his tenants of Leys, Crathes, and others, as well as to the public at large), and to pay the feu duty and perform the other prestations thereinafter mentioned, disponed to the company certain land—"Declaring hereby that the several pieces of ground above described are disponed to the said railway company, but without prejudice to the deed of agreement between the deceased Sir Alexander Burnett, of Leys, Baronet, my brother, and the Deeside Railway Company, dated the 24th day of January and 21st day of February, 1853, for the purposes and subject to the conditions, restrictions, and clauses herein contained, which are hereby declared to be real liens and burdens affecting the said pieces of ground —namely, the said railway company shall be bound, within twelve months from the date of these presents, to erect, at their own expense, on the said piece of ground first above-mentioned, on the west side of the bridge over the road leading to the said bridge across the Dee in course of erection at Durris, a station for passengers and goods travelling by the said Deeside railway, at which all passenger trains shall regularly stop, to be called the 'Crathes' station, containing a suitable waiting-room, covered passenger-shed, platform, and all proper accommodation for first-class and other passengers, and to maintain such station in all time coming, it being hereby provided and declared that the said railway company shall be bound to have a signal-post erected at the said station, on which a signal, visible from Crathes Castle,

shall be displayed whenever any passenger or parcel for Crathes shall arrive at the station. It being hereby expressly provided and declared that, in the event of the said railway company not erecting said station within the time above mentioned, and making the accesses thereto shewn on the said plan, or at any time hereafter discontinuing the use thereof as a regular goods and passenger station of the said railway, then, and in that case, these presents and the rights to follow hereon shall *ipso facto* become null and void, without declarator, and the said piece of ground, and all buildings and works constructed thereon, shall revert and belong to me and my foresaids, free and disincumbered of all burdens whatsoever, alike as if these presents had never been granted, and this without prejudice to our legal rights and remedies against the said railway company for obtaining implement of the prestations incumbent on them, as above expressed. To be holden, the said pieces of ground and others, of and under me and my heirs and successors in feu-farm, fee, and heritage for ever, for payment to us by the said railway company and their foresaids of the sum of five shillings sterling yearly in name of feu-duty, term of Martinmas in each year, beginning the first payment thereof at the term of Martinmas, 1863, for the year then ending, and so forth yearly in all time coming," with a duplicant every twenty-fifth year.

The land comprised in the charter was over two acres in extent, and was stated to be of the annual value of about 10*l*.

The station was built at Crathes as agreed. The respondents subsequently took over the undertaking of the Deeside Railway Company, and the present action was brought against them by the appellant in consequence of certain trains being run through without stopping at Crathes. The appellant claimed that it ought to be declared (but without prejudice to the abovementioned agreement of 1853) that the respondents are bound regularly to stop at the station called "Crathes," for the purpose as well of taking up as of setting down passengers, all trains now and hereafter passing through the said station and carrying passengers, except only such trains as may be hired by an individual or individuals for his or their exclusive use, and particularly, so long as they run them, the following:—(1) The train in use to be run during the summer season, leaving, or advertised to leave, Aberdeen for Banchory, Aboyne, and Ballater at or about one o'clock P.M. on Saturdays; (2) the train in use to be run during the summer season, leaving, or advertised to leave, Ballater for Aboyne, Banchory, and Aberdeen at or about eight o'clock P.M. on Saturdays; (3) the train in use to be run during her Majesty's stay at Balmoral, leaving, or advertised to leave, Aberdeen for Banchory, Aboyne, and Ballater at or about half-past three o'clock A.M. on every day of the week except Monday, but including Sunday; (4) the train in use to be run during her Majesty's stay foresaid, leaving, or advertised to leave, Aberdeen for Banchory, Aboyne, and Ballater at or about one o'clock P.M. on Sundays; (5) the train in use to be run during her Majesty's stay foresaid, leaving, or advertised to leave, Ballater for Aberdeen and intermediate stations at or about five minutes past three o'clock P.M. on week days; and (6) the train in use to be run during her Majesty's stay foresaid, leaving, or advertised to leave, Ballater for Banchory and Aberdeen at or about forty-five minutes past ten o'clock A.M. on Sundays.

From the evidence of Mr. Moffat, the respondents' general manager, the following facts appeared—

Trains 1 and 2 were run on Saturday only, and were excursion trains to accommodate an excursion from Aberdeen to Banchory, Aboyne, and Ballater. They were in fact the same train starting from and returning to Aberdeen. The train only ran if there were a sufficient number of excursionists offering. Only those holding special return tickets could travel by it. On the outward journey passengers were set down, but not taken up, at Banchory and Aboyne, and on the return journey were taken up but not set down. No luggage was allowed. The trains are advertised specially, but not mentioned in the ordinary time-tables, except by mistake in June and September, 1882.

Trains 3, 5, and 6 are known as Queen's Messenger trains. They run only during the Queen's stay at Balmoral, and the

company receives a subsidy from the Home Office in respect of them. They are advertised in the ordinary time-tables, and ordinary passengers are allowed to travel by them to some extent. The company considered itself bound to comply with any request from the Queen or Home Office as to the time and manner of running the trains.

Train No. 4 is known as a Post Office train, also run only during the Queen's stay at Balmoral to carry her correspondence, in compliance with a special requisition made by the Post Office under the provisions of its mail contract with the company. The train is under the control of the Post Office, which may object to its stopping, but has not done so. It does not stop regularly at Crathes, but passengers are booked to Crathes if they desire it.

The Lord Ordinary, on the 3rd of July, 1883, decided in favour of the railway company, and his decision was affirmed by the Second Division of the Court of Session on the 20th of December, 1883.

Sir F. Herschell, Q.C. (*Solicitor-General*), and *Asher, Q.C.* (*Solicitor-General for Scotland*) (*Haldane* with them), for the appellant.

Balfour, Q.C. (*Lord Advocate*), and *J. P. B. Robertson*, for the respondents.

Sir F. Herschell, in reply, was directed to confine his argument to the question as to the excursion trains, but did not insist on the appellant's claim as to them.

THE LORD CHANCELLOR (EARL OF SELBORNE).—The only difficulty with regard to the two classes of trains, which have been called Queen's Messenger trains and Post Office trains, that I have felt in this case since it was opened, has arisen from the profound respect which I entertain for those learned Judges in the Court of Session who saw their way to a conclusion of which, I must frankly confess, I do not clearly understand the grounds.

The contract with which we have to deal is in general terms. Two acres of land were feued off at a nominal or almost nominal quit-rent, very much less than the value of the land, upon the terms of this contract; and one of those terms was that on that land a station, with all proper accommodation for passengers, should be erected and maintained, and that (because I do not think that what has been called the parenthetical form in which the words occur makes the slightest difference) all passenger trains of the company should regularly stop there. Obviously it would be convenient and beneficial to the owner of the adjoining property, Sir James Burnett, the person who granted the feu, that there should be the greatest possible facility of travelling from that station by the company's trains. And if the company entered into this contract, why should a Court of law not regard the landowner who stipulated for such a provision, which the company were quite able to accept or to reject according to their view of their own interest?—why should that contract be regarded with more disfavour by a Court of law than any other between parties capable of contracting together which they make when bargaining for their respective interests? There was no compulsion upon either of them; it was perfectly voluntary; there was good consideration given. And if a Court of law is not to regard the contract with disfavour, why should it so regard the claim of the person with whom the contract has been made to have it fulfilled except so far as he may be disposed voluntarily to dispense on any occasion with its fulfilment? I own I have a difficulty in following some observations in the judgments below, which may or may not have influenced the conclusion of the learned Judges, but from which I am bound to express my own dissent.

Then the case resolves itself simply into a question of the construction of this contract with reference to a given state of facts. Are or are not these trains, which are called Queen's Messenger and Post Office trains, passenger trains within the reasonable meaning of these words? The contract is universal; it says, "all passenger trains." If they are—in a sense consistent with the intention of the contract, as that intention is to be gathered from its terms with due regard to extrinsic facts—passenger trains, it is quite clear that the company have engaged to stop them unless the holder of this pro-

perty, the person entitled to the benefit of the agreement, dispenses with it. Now it seems to me that these trains have every possible characteristic of passenger trains, and no characteristic of any other sort of trains. They are advertised in the company's time tables, and with regard to some of them the form of the advertisement is this: they are not only put down to go at certain times, and stop at certain stations (in one instance I observe that this very station is among them), but the classes of passengers to be carried by them are mentioned, first or third, as the case may be. And in the only case (1) in which there is no entry in the proper column of the time table of the classes of passengers, there is this note: "Stop where required to set down passengers off the south train," shewing plainly that it is a passenger train, and that passengers are invited and expected to come by it—at all events those arriving from the south. And the limited form of expression with regard to "passengers off the south train," is explained by the fact that it would start from Aberdeen in the middle of the night.

Therefore, in truth, these time tables are the ordinary notice and invitation to all the world that there are such trains, and that passengers may go by them upon the usual and ordinary terms, for there is not the least qualification of the right of a passenger travelling by any one of these trains to be received and put down on the same terms and with the same advantages, such as carrying luggage and so forth, in all respects as ordinary passengers are entitled to. In point of fact, the company do carry passengers in that way, and, excepting so far as there is mention of "Queen's special" at the head of two of these trains in the time table, there is nothing to inform any single passenger of anything distinguishing these from other trains; and the heading "Queen's special" informs them of nothing more than that this train which is to take passengers also answers some purpose under some special arrangement in which her Majesty has an interest. But there is no inconsistency whatever between a special arrangement in which the Queen has an interest, or a special arrangement for carrying mails for the Post Office, and the fulfilment of that special arrangement by means of ordinary passenger trains, unless there were something in the terms of the special arrangement to exclude the mode of fulfilling it. There are no such terms in the arrangements here, either as to the Queen's messengers or as to the Post Office bags; and, in point of fact, the terms are fulfilled by these trains, which are, to all practical intents and purposes whatsoever, passenger trains. They are passenger trains entirely under the control of the company; they are passenger trains in which, by the existing contracts, neither the Post Office nor any other authority can forbid the company from carrying passengers. And to say that a train is not a passenger train, which in all other respects is so, because the company may have been led to agree to do something which it can do and does by means of that train, and may have agreed specially to start that train at particular hours, and to keep time in arrival as well as in departure according to a particular table—to say that that makes it less a passenger train is really extravagant: for in every case, so far as the public are concerned, some time has to be fixed. The company may fix their own time ordinarily, and if they agree for a consideration with anybody else to start a train at a particular hour, and that it shall arrive at certain places at particular hours, yet, if they use it as a passenger train, it cannot be less so because the time is fixed by means of some collateral agreement. To me, therefore, it appears that as to these trains there is no intelligible ground for refusing to the appellant the benefit of the contract.

With regard to the excursion trains, I am disposed to think that there are some material differences. I shall state the way in which they strike me, but I shall do it with less fulness, because I do not understand any serious controversy to be raised by the learned Solicitor-General as to those excursion trains when they are run under special advertisements and are not advertised as running regularly in the ordinary time tables.

(1) The 3.30 A.M. train, headed in the time table "Queen's special."

My view is, that there are reasonable grounds for distinguishing these special excursion trains specially advertised from passenger trains in the common popular sense, and in the sense in which I think those words should be understood in this contract. A passenger train *prima facie*, I think, is a train advertised to take passengers generally, people travelling from place to place, upon the terms and in the manner ordinarily applicable to such passengers. As an illustration, I may refer to the subject of luggage. In the special Act of Parliament of this particular company, as we were informed, there is a provision that a certain quantity of luggage may be carried by every passenger. I may take another illustration from the practice of issuing season tickets (composition tickets, as I see they are called on this record) for travellers by passenger trains. Now it is quite certain that the right to carry luggage, applicable to passengers generally, would not be applicable to persons who as a special favour were taken in a luggage or goods train; and we find upon the evidence, with regard to these composition tickets, that they do not give a pass for these special excursion trains, and no luggage is allowed to be taken by them; besides which, people are not carried upon the ordinary terms, either as to payment or otherwise, because every man who goes by such an excursion train must take a return ticket to come back to the starting point—so that he is not a traveller in the ordinary sense of the word, and he cannot claim to get out anywhere except at the place to which he has a pass according to that contract. I am far from saying that arguments of some weight might not be used for the purpose of bringing in even such excursionists as passengers; but upon that point I cannot help observing that it is conceded that there may be exceptions to the words "passenger trains" in the case of persons who do pass by and are conveyed on the railway when they have specially hired a train. It was not disputed that if a large number of persons combined together specially to hire a train they would be in the same situation. Now these excursionists do not exactly do that; but I think, taking the whole matter into account together, that it is safe to say that the parties to this contract had in view, by the term "passenger trains," something different from this class of excursion trains, although they carry passengers.

I am not at all disposed to use words in your Lordships' order which would let in unnecessary controversy, as to whether or no the general right of the appellant is evaded by the use of particular words, when in substance there is no sufficient ground for a distinction or exception. The learned Solicitor-General is not unwilling, as I understand, if the House should think that excursion trains of this kind should be excepted, that they should be excepted by adding these words at the top of page 4 (printed case) after the words "exclusive use," "and except special excursion trains not advertised as running regularly in the ordinary time tables of the company;" and I think it much safer to adopt those words than to use the words "special excursion trains" in a more general form, which might let in questions as to what are such trains. I think that when they are not advertised as running regularly in the ordinary time tables of the company, they are then broadly distinguished from those trains by which the company undertake to carry passengers in the ordinary manner. I cannot help agreeing with what one of your Lordships intimated in the course of the argument, that it is very undesirable to refer in the declarator to particular trains some of which have been and others may be discontinued, or the times of which may be altered, which would make a reference to them useless; and your Lordships' view of the law applicable to the facts having been sufficiently expressed in the opinions which you may deliver, it will be enough to pronounce a declarator in these words:—[His Lordship read the order, and continued:] I propose, therefore, to your Lordships to reverse the interlocutor appealed from, and to make that declaration, and with that declaration to remit the case to the Court below. The appellant of course will have the costs of the action and of the appeal.

LORD WATSON.—The only doubts which

I have entertained in this case have arisen from the view which was taken, first by the Lord Ordinary, and then by the majority of the Second Division of the Court of Session. I cannot help thinking that the conclusion at which their Lordships arrived was to some extent affected by the considerations with which they deal in their judgments—considerations which, in my opinion, ought not to influence the construction of the obligation which we have to interpret. The Lord Ordinary enters at some length upon a consideration of the question whether, apart from the trains in dispute, there is sufficient train service for the traffic of Crathes and its neighbourhood. One of the learned Judges of the majority in the Inner House expresses doubt as to the validity of the obligation (2), and expresses himself in no doubtful terms as to the character of the obligation; and, entertaining those views, it is not matter of wonder that he should have arrived at a conclusion favourable to the respondents. I can only say that I see no reason to doubt that this condition has been validly imposed upon the feuar, and will run with his estate so long as the superior has a legitimate interest to enforce it. And I see as little reason to doubt that it must be dealt with as a fair and equitable arrangement made by parties *sui juris* in the year 1863, and that it is not open to any imputation of being an unfair or one-sided contract.

Then as to the construction of the words of the obligation, I agree with the Lord Chancellor. The Queen's Messenger trains and the Post Office trains, as they have been termed, are simply composite trains, partly for the service of her Majesty or of the Post Office, and partly for the service of the travelling public; but the fact that they do accommodate the public, carrying them as passengers from station to station, is quite enough to stamp them with the character of passenger trains within the meaning of this obligation. And in considering whether they are passenger trains or no, it appears to me to be quite immaterial whether the service of the Post Office was added to a train already running for the accommodation of the public, or carriages for the conveyance of passengers were added to a train started for the purpose of carrying the mails. They are serving the purpose of passenger trains, and so long as they possess that character, although they may have other uses and purposes, and although the motive for starting them may not have been the convenience of travellers, it appears to me that they are passenger trains within the meaning of the feu charter.

As to the excursion trains, as run in the year 1882 and since, I have formed a different opinion. I should not have held the same opinion with reference to that train as it was advertised to the public in October, 1882. I am by no means of opinion that every train called an excursion train ceases to be a passenger train within the meaning of this obligation, but the circumstances which led me to think that this is not a passenger train within the meaning of the charter are, briefly, these: In the first place, there is a special arrangement made with each passenger at Aberdeen, differing in its terms from the ordinary contracts made by the company with the travelling public; and, in the second place, the persons who are admitted to travel in that train are collected at Aberdeen, as I understand the facts of the case, and the accommodation provided is simply sufficient to convey them from that terminus to their several destinations up the Dee and back again on the same day, and is not calculated to afford any accommodation to the travelling public.

I concur in the judgment which has been proposed by the Lord Chancellor.

Lord Bramwell.—I am of the same opinion. It seems to me that the defence "before us is so *ex facie* nimious and unreasonable as to excite prejudice against it, and one has to be on one's guard to see that the exact legal rights of the parties, however unreasonable, are satisfied." In saying this, I know I differ as much as possible from the very learned and able Judge whose words I am quoting, and I know the risk I run in so doing. But I feel bound to express my opinion strongly, because I think he has done great injustice to the plaintiff. I cannot but think that the learned Lord has been under the in-

(2) Lord Young, 11 Court Sess. Cas. 4th ser. at p. 386.

fluence he deprecated. I am aware that I may be acted on by this feeling of injustice done.

Let us see what the case is. The pursuer, or his predecessor in title whose rights he has, gave land to this company, one may almost say for nothing (that is to say, upon a nominal rent-charge of, I think, five shillings a year), except the benefit of this obligation which the pursuer is now seeking to enforce. I cannot help thinking that if this question had arisen thirty years ago, when the directors who made the bargain with the pursuer's predecessor and the manager then in existence would have had to decide it, it never would have been a question at all. They never would have made such a point as has been made to-day, because I am satisfied in my mind that they would have known that in fairness they ought not to be setting up such a case as the respondents are setting up now. But Mr. Moffat, I think, in one of his letters (to do him justice) states that he had not seen the feu charter until after he had made the contention which had resulted in these proceedings taking place; and I dare say that he and his directors have satisfied themselves in some way that it is a defence which they may properly make and a case which they may properly set up. As I believe it to be *bona fide*, I will not call it scandalous, but I think it extravagant.

Now, having made these remarks, I will address myself to the particular question before us; although I protest that I have great difficulty in giving any other judgment than this, that a "passenger train" is a passenger train. The words are not words of art—they want no explanation either by railway people or by experts of any sort or kind. The question is whether these are passenger trains. The answer is, they are passenger trains; and, to my mind, they are passenger trains that carry passengers in the ordinary way upon the ordinary terms—except the excursion trains, as to which I will say a word or two presently.

It seems to me that the difficulty has arisen from a mistake—partly, I must say with great respect, as I think, from a prejudice. Possibly it may be said in return that I am labouring under a prejudice in the opposite direction—and I may be, though I think not. It seems to have arisen partly from that, and partly from a notion that things not specifically within the contemplation of the parties to an agreement ought not to be held to be within the effect of it—which, to my mind, is a very great mistake, a mistake illustrated by the case I mentioned in the course of the argument, the case of the telephones. They were held to be within an agreement which had been made at a time when telephones were not known—they were held to come within general words which the prudence of people had put in for the purpose of providing for something which might arise at a future time. That seems to be one origin of what I think the mistake. Another cause of it (I say it with sincere respect for the learned Lord of Session, Lord Young, who seems to rely upon the point so much) is the notion that because a passenger train running regularly comes into existence, if one may so say, under the special circumstances of a bargain either with the Home Office or with the Post Office, therefore that train—I was going to say although a passenger train—brought into existence under those particular circumstances is not a passenger train within the agreement. I cannot see the reason of that. I can only say I do not agree. I do not see why it should be so.

Now, one word with respect to excursion trains. One knows perfectly well what is meant in practice by an excursion train. It is a train which, like others, goes from one place to another; it may or may not stop and pick up passengers on the road—I believe it commonly picks them up; but it is a train which goes from one place to another with a view to people getting to that other place on cheap terms, and very frequently upon the condition that the railway company are not to be delayed or inconvenienced by people taking luggage with them. But why is that not a "passenger train"? Passengers go by it, and they go by it from one place to the other in order that they may get to the other place. It is not the less a passenger train because they pay a small fare; nor is it the less a passenger train because by

agreement with the company they do not carry luggage with them. It seems to me really that the substance of the thing is that; and I said before, passenger train is not a term of art, it is a popular expression, and these, popularly speaking, are passenger trains, and no reason has been given why the words should have any other than their natural meaning. As to the "pound of flesh" argument, the judgment is not that the appellant should have none, but about three-quarters of his pound. His right is to all; whether as a reasonable man he should exact all, is another matter.

LORD FITZGERALD.—The judgment of your Lordships' House is invited on the construction of a portion of the feu charter of 1863, in which the language used is very general. It is open to us, and I should say necessary for a just conclusion, to consider the relation of the parties to each other before the feu charter was executed, so as to ascertain what the parties had in view and intended, and to limit the general words, if necessary, to what is fit and just.

There was a prior deed of agreement of 1853, made with the pursuer's predecessor, which is still in force, and it is observable that the feu charter of 1863 is made expressly "without prejudice to that deed of agreement." By that agreement the company (the defenders) undertake to make certain accommodation works, and *inter alia*, by clause 9, that "a siding shall be made at the level crossing marked number $\frac{46}{a}$ on said deposited plans, for the accommodation of the proprietor and tenants of the said estate of Leys; and the said company hereby undertake that any of the passenger trains shall be stopped at said siding, although not appointed by the company's time bills so to do, on a preconcerted signal, to be arranged by the company with the proprietor of said estate, being shewn, so as to take up or set down any passengers proceeding from or to Crathes at said siding." If it was necessary now to interpret that provision, speaking for myself, I would probably say that it applied to each and every train coming within the ordinary description of a passenger train, and that the obligation on the company was to stop each of such trains at the siding on the preconcerted signal. In other words, the Crathes siding was a signal station, at which, when there were passengers to take up or set down, the company was bound on signal to stop each one of its passenger trains. The position of things was probably found to be inconvenient, and not free from danger, and it became desirable to provide a station with all its conveniences in place of an unprotected siding, and relieve all parties from the cumbrous necessity of signalling.

That being the state of things, we have now to look to the feu charter of 1863, the main object of which, as well as its consideration, was the obligation on the company "to erect and build upon the ground hereby disponed a station of the said railway for passengers and goods, containing the accommodation after-mentioned (which station will be of advantage to me and my tenants in the estate of Leys, Crathes, and others, as well as to the public at large)," and the stipulated obligation was that "the said railway company shall be bound within twelve months from the date of these presents to erect, at their own expense, on the said piece of ground first above mentioned, a station for passengers and goods travelling by the said Deeside Railway, at which all passenger trains shall regularly stop, to be called the Crathes Station, containing a suitable waiting-room, covered passenger shed, platform, and all proper accommodation for first-class and other passengers, and to maintain such station in all time coming; it being hereby provided and declared that the said railway company shall be bound to have a signal-post erected at the said station on which a signal visible from Crathes Castle shall be displayed whenever any passenger or parcel for Crathes shall arrive at the station." There are other accommodation provisions, but they are all confined to the requirements of the station. Then comes the irritancy clause for forfeiture of the right for breach of the feudal contract; but it is unnecessary to advert to it, as it has been disposed of in the course of the argument.

The pursuer contended below, as he has insisted here, that by the stipulation "at which all passenger trains shall regularly stop," there is created an absolute

obligation on the company to stop at the Crathes station each and every of all the passenger trains that pass along the line. The defenders, on the other hand, have always admitted that they are bound to cause all passenger trains running on their line for the ordinary service and traffic of the district to stop at Crathes.

I have been at some loss to understand the meaning or extent of this admission on the part of the defenders, and rather turn back on the real question, What is a passenger train? It would seem to me that every train of the company over which the company retains its general control and dominion, and by which the company professes or offers to carry for hire in ordinary course such travellers as may take advantage of it on payment of their fares, is within the meaning of the stipulation in controversy a passenger train. It may be a special, or it may be an express train, it may carry the mail, or a Queen's messenger, or even excursionists, but it does not follow that it is not also a passenger train.

I am of opinion that in the construction of the obligation in question "all passenger trains" is to be interpreted as meaning "each and every passenger train," and as embracing the trains in controversy, save the special excursion trains which are run subject to special and peculiar conditions and are not intended for ordinary travellers. It may be that the obligation assumed by the company was not wise or prudent on their part; but that is not for our consideration. It was not illegal or unreasonable on the part of the pursuer to insist on the stipulation for the benefit of himself and his tenants. We have but to interpret and give effect to the plain meaning of the language used. If inconvenience or injury may arise to the company from the enforcement of their contract, they have ample means within their reach to protect themselves.

That the said interlocutors complained of in the said appeal be, and the same are hereby reversed: And it is declared, that the defenders (respondents) are bound regularly to stop at the station called "Crathes," on the line of railway belonging to the defenders (respondents) between Aberdeen and Ballater, for the purpose as well of taking up as of setting down passengers, all trains now and hereafter passing through the said station for the conveyance of passengers, except only such trains as may be hired by an individual or individuals for his or their exclusive use, and except special excursion trains not advertised as running regularly in the ordinary time tables of the company. And with this declaration, it is ordered that the said cause be remitted to the Court of Session in Scotland to do therein as shall be just and consistent with this judgment. And it is further ordered, that the respondents do pay, or cause to be paid, to the appellant the costs of the action in the Court of Session. And it is further ordered, that the respondents do repay to the appellant the sum of 187*l.* 16*s.* 4*d.* paid by him to them on the 4th of April, 1884, in name of costs, and 1*l.* 2*s.* 4*d.* paid by him to them on the 9th of April, 1884, in name of dues of extract of the action in the Court of Session. And it is further ordered, that the respondents do pay, or cause to be paid, to the appellant the costs incurred in respect of the said appeal to this House.

Solicitors—Martin & Leslie, agents for Edmonds & Macqueen, Aberdeen, for appellant; Dyson & Co., agents for Gordon, Pringle, Dallas & Co., Edinburgh, for respondents.

1885. March 31. LIGHTBOUND (*appellant*) *v.* THE HIGHER BEBINGTON LOCAL BOARD (*respondents*).

Public Health Act, 1875 (38 & 39 *Vict.* c. 55), *s.* 150—*Paving Street—Apportionment of Expenses — Premises separated from Street by Wall—Land "Fronting, Adjoining, or Abutting on Street."*

[For the report of the above case, see 54 Law J. Rep. M.C. 130.]

1885. July 31. August 3. } THE MOGUL STEAMSHIP COMPANY *v.* MCGREGOR AND COMPANY AND OTHERS.

Injunction—Conspiracy— Combination in Restraint of Trade—Rebate Freight—Damages resulting to Individual.

Several shipowners, whose vessels traded regularly and all the year round to and from certain Chinese ports, formed themselves into a conference, and agreed to allow a rebate every six months of five per cent. on all freight to those merchants who shipped their goods exclusively on conference vessels, and issued a circular notice that any shipment of goods on a non-conference vessel would render the shipper liable to forfeit the rebate on all his shipments in the conference vessels. The result was that the plaintiffs, part owners of non-conference vessels trading to the same ports, had to ship goods at an unremunerative rate to counteract the loss of the rebate, and sustained damages, for which they sued.

On an application for an interim injunction to restrain the issue of the circulars and to restrain the defendants so acting as to prevent the plaintiffs shipping goods from those ports at an unremunerative rate,—Held, *that there being no evidence of danger of irreparable injury to the plaintiffs, and the cause of action being on the affidavits not free from doubt, the Court ought not to grant an interim injunction.*

Semble—*A combination made with a view of excluding particular ships from certain ports altogether, resulting in injury to the owners of such ships, and not merely to advance the trade of the persons combining, is against public policy and an actionable conspiracy.*

This was a summons referred by Day, J., at chambers to the Divisional Court for an interim injunction restraining the defendants from acting in such a way as to prevent the plaintiffs carrying on their lawful business as merchants, and loading vessels at proper freights in the ports of China, thereby ruining the plaintiffs in their trade. The plaintiffs are part owners of certain vessels trading between Australian ports, and also, at certain times in the year, ports in the Yangtse-Kiang River and London. The defendants formed themselves into a conference for the purpose of obtaining the exclusive control of the China tea trade, in order, as they contended, to enable them to run a line of steamers to the China ports at stated intervals throughout the year. The plaintiffs, by their action for damages and injunction, sought to restrain the defendants from doing certain acts in furtherance of this combination which the plaintiffs alleged had had the effect of excluding them from the China trade, and more especially to restrain them from agreeing to refuse, and refusing, to accept cargoes from shippers on the Yangtse-Kiang River except upon the condition that the shippers should not ship by any vessels of owners not belonging to the conference. The plaintiffs alleged that by unlawfully combining together with intent to injure the plaintiffs, the defendants have prevented the plaintiffs obtaining cargoes except at ruinous rates—25*s.* a ton, instead of 60*s.* or 70*s.* The following letters were issued by the defendants' agents in China:—

"Shanghai: May 10, 1884.

"Dear Sirs,—To those exporters who confine their shipments of tea and general cargo from China to Europe (not including the Mediterranean and Black Sea ports) to the P. and O. S. N. Co.'s, O. S. S. Co.'s, Glen, Castle, Shire, and Ben lines, and to the steamships *Oopack* and *Ningchow*, we shall be happy to allow a rebate of five per cent. on the freight charged. Exporters claiming the returns will be required to sign a declaration that they have not made nor been interested in any shipments of tea or general cargo to Europe (excepting the ports above named) by other than the said lines. Shipments by the steamships *Albany*, *Pathan*, and *Ghazee* on their present voyages from Hankow will not prejudice claims for returns. Each line to be responsible for its own returns only, which will be payable half yearly, commencing October 30 next. Shipments by an outside steamer at any of the ports in China or at Hongkong will exclude the firm making such shipments from participation in the return during the whole six-monthly period within which they have been made, even though other branches

may have given entire support to the above lines. The foregoing agreement on our part to be in force from present date till April 30, 1885. We are, &c."

"Shanghai: May 11, 1885.

"Dear Sirs,—Referring to our circular dated May 10, 1884, we beg to remind you that shipments for London by the steamships *Pathan*, *Afghan*, and *Aberdeen*, or by other non-conference steamers, at any of the ports in China or at Hongkong, will exclude the firm making such shipments from participation in the return during the whole six-monthly period in which they have been made, even although the firm elsewhere may have given exclusive support to the conference lines. We are, &c."

Sir Henry James, Q.C. (with him *Sir F. Herschell, Q.C.*, *Crump, Q.C.*, and *F. Gorell Barnes*), for the plaintiffs.—This so-called combination is in restraint of trade, its object being to prevent shippers trading with any others but the conference shipowners. It is not the case of an individual tradesman contracting with another for exclusive dealing with him. The penalty is far beyond the benefit, which is said to be maintaining a regular line of steamers all through the year, for if a shipment, however small, be made on a vessel not belonging to the defendants, although there may be no vessel of the defendants at the port at the time, the merchant runs the risk of losing his rebate on all the freight chargeable by the defendants for goods sent by him on the defendants' ships from all or any of the China ports. This freight might come to thousands of pounds in the six months. The defendants have no right by combining to restrain others from trading. The Court will interfere to restrain a combination to prevent a particular individual carrying on his trade—*The Queen* v. *Parnell* (1), in which case *The Queen* v. *Druitt* (2) was cited. In the latter case there was held to be molestation. If there be a wrong shewn, the Court will interfere by interim injunction, as, for instance, in light and air cases. The fact of combination may make that illegal which in an individual would be legal. The object here is to crush all opponents and to create a monopoly in favour of the defendants and to the prejudice of the plaintiffs, which would be hurtful to the community at large, as it would enable the defendants to charge exorbitant prices. This danger would far outweigh the alleged present advantage of a continuous service of steamers. It is plain that the plaintiffs are aimed at, as by the first circular the *Pathan* and *Ghazee*, two of the plaintiffs' ships, were allowed to take cargo from Hankow, but by the second those vessels are not excepted. It is a system of "boycotting" the plaintiffs—a combination really to ruin the plaintiffs, and therefore an unlawful combination within the principle laid down in *The King* v. *Eccles* (3), wherein Lord Mansfield said, "It is contended that the means by which the intended mischief was effected ought also to have been particularly set forth . . . ; but this is certainly not necessary, for the offence does not consist in doing the acts by which the mischief is effected, for they may be perfectly indifferent, but in conspiring with a view to effect the intended mischief by any means."

This case does not differ from an agreement to establish a knock-out, which has been held to be unlawful — *Hilton* v. *Eckersley* (4). The Court, since the Judicature Act, has granted an injunction to restrain the publication of a trade libel—*Saxby* v. *Easterbrook* (5).

Horace Davey, Q.C. (with him *Finlay, Q.C.*, and *Pollard*).—This is a novel application, and it is at any rate very doubtful if there is any cause of action. The application is to restrain a conspiracy—that is, a combination to do something unlawful, or something lawful but by unlawful means, with intent to injure an individual. Malicious intent to damage the person suing is of the essence of conspiracy. If the object is to maintain the defendants' own trade and induce people to trade with them it is lawful, and does not become unlawful because the result may be damage to an individual. There is no authority for such an action as this. In *The*

(1) Not reported.
(2) 10 Cox, 592.
(3) 1 L.C.C. 274.
(4) 6 E. & B. 47; 25 Law J. Rep. Q.B. 199.
(5) Law Rep. 3 C.P. D. 339.

King v. *Eccles* (3) the object was to injure a particular individual. The jurisdiction to restrain a libel on trade is only after the libel has been ascertained at the trial, not to grant an interlocutory injunction —*Clarke* v. *Freeman* (6), *The Prudential Assurance Company* v. *Knott* (7), and *Fisher* v. *The Apollinaris Company* (8). An injunction will only be granted before trial when there is shewn to be a danger of irreparable injury. Here there is no pretence that the injury, if any, would be irreparable, or that the plaintiffs could not be compensated by damages.

The object of the defendants is not to injure the plaintiffs, although that may result. It is to afford the public the advantage of a continuous service all the year through, which they cannot do if other vessels are to come in during the tea season, the harvest time, as it were, and divide the carrying trade with those who have been running their steamers all the winter. This conference is merely a combination among the defendants themselves to regulate their own trade. They say, "We will return you a percentage on the freights if you will give us all your trade; but if you give us only part we cannot afford to make the return. This is not a penalty nor fine imposed. There is no right to the return except upon conditions, and if they do not fulfil those conditions they cannot have the benefits. It is only a conditional promise to carry at a certain rate to those who give them their whole trade. If the whole trade be not given the agreement falls to the ground. It is clear that the conference was not directed against the plaintiffs, because it has existed since 1879, and the plaintiffs only came into existence in 1883. Even if there be a cause of action, this is not a case for interlocutory injunction, since it is a doubtful case: no evidence is given of danger of irreparable injury being done, and there has been a delay of two months since writ issued before moving.

Sir Henry James, in reply.—If the end is unlawful the means need not be unlawful, and the end here is to prevent in future all who are not in the conference, including the plaintiffs, from trading.

The defendants, with powerful means at their disposal, combine to drive all competitors away by imposing a penalty not commensurate with the damage incurred —namely, the loss of freight—on those who only partially trade with them and not exclusively. By shipping twenty chests of tea on a non-conference vessel, a merchant, dealing except in this one instance exclusively with the defendants to an amount of 40,000*l.*, is liable to forfeit 2,000*l.* The act of combination resulting in driving off competition is evidence of malice which need not be express against the plaintiffs. The offer is not only "we will give you a sum of money if you will deal with us exclusively," but an offer of a sum of money not to deal with another person. That is actionable.

The judgment of the Court (9) was (on August 6) delivered by

Lord Coleridge, C.J.—This was an application to the Court for an interim injunction to restrain the defendants from continuing to "boycott" the plaintiffs, as it has been called—and I see no reason to object to the term. A large number of important and rich shipowners joined together in issuing circulars to the merchants in China and their agents at the various ports there—shippers more especially engaged in the tea trade—to the effect that if they dealt with the plaintiffs' ships they, the defendants, would deprive them of benefits accruing to them in their dealings with the defendants. If they dealt with the defendants exclusively they would receive those benefits; if they did not deal with the defendants exclusively, even as to a small part of their trade, they would lose the advantages as to the whole of their shipments. The plaintiffs say the result of this has been to drive them out of the China trade, as they cannot, in face of this, run their vessels at remunerative rates. They say this is a combination to exclude the plaintiffs' ships from those ports, and that it is entered into purposely to injure the plaintiffs, and is against pub-

(6) 11 Beav. 112.

(7) 44 Law J. Rep. Chanc. 192; Law Rep. 10 Chanc. 142.

(8) 44 Law J. Rep. Chanc. 500; Law Rep. 10 Chanc. 297.

(9) Lord Coleridge, C.J., and Fry, L.J.

lic policy. Assuming that the plaintiffs could establish this, and without reference to the defendants' counter-statement, it must nevertheless be borne in mind that the application is interlocutory. It is conceivable that such a conspiracy might be established in fact; and if so, and the intentions were shewn to be not mere honest endeavours to support the defendants' trade, but to ruin the plaintiffs, it seems to me that it would be ground for an action, and within the principle laid down by Lord Mansfield in *The King* v. *Eccles* (3)—which principle is good in law, although the illustration given by him is capable of argument, and was commented on in the judgment in *O'Connell* v. *The Queen* (10). If the law laid down in *The Queen* v. *Parnell and others* (1) is right—and I see no reason to doubt it—a conspiracy to "boycott" is actionable, and I find it difficult to distinguish the facts there from those in this case. It is also plain, however, that if the plaintiffs could succeed in their contention, the damages might be exemplary and such as would severely tax the resources of the conference owners; and the question arises whether, all that the plaintiffs allege being admitted to be true, this is a case for an interlocutory injunction. My learned brother's experience in these cases is greater than mine, but we both agree that it is not such a case. First, although it would be within the legal principle enunciated by Lord Mansfield, it is a very difficult case to establish; and in this view it is important to consider the defendants' contention, which puts a very different complexion on the matter, and which they may get a jury to believe. They say they have a perfect right to do as they have done in the fair protection of their trade. The public, as they contend, have the advantage of their vessels running all the year round, whereas the plaintiffs' vessels only run in the tea season. They say it is essential, in order to secure the continuous running of vessels, to protect themselves during the tea season, when only they are able to get remunerative freights; but that if interfered with during this harvest time, as it were, they cannot run their vessels at other times, when little or no profits can be made out of the freights. This is a matter entirely for proof by evidence, and it is for the jury to decide which is right. The matter, therefore, is very doubtful, and it would be a strong thing for this Court at this stage to decide it practically for some months by issuing an interim injunction. If the plaintiffs are right, they can be amply compensated by the jury in damages; and I have always understood that to be almost by itself a reason for refusing an interim injunction. Why should it issue if damages will compensate them, and there is nothing here shewing any danger of an irreparable injury accruing to the plaintiffs. There may be a temporary difficulty in their carrying on their China trade, but that is very different from an irreparable injury—such as occurs, for instance, when a fine old tree is threatened to be wrongfully cut down, for which there would be no equivalent in damages.

Further, the defendants contended that there are other circumstances in this case which really amount to facts of such a character as to disentitle the plaintiffs to an interim injunction—as, for instance, that this state of things had been going on from 1879, whereas the plaintiffs' company was not formed till 1883, and that the plaintiffs, therefore, to use a term borrowed from another branch of the law, "came to the nuisance," and they were fully aware of the conference at the date of the inception of the company. Moreover, it is said the company is primarily an Australian company, who sought to add the China trade to that from Australian ports, after full notice of the existence of the conference; and that there has been delay in making the application. These considerations, and the novelty of the application, and absence of authority, make us think it too doubtful a case for an interlocutory injunction. The application must, therefore, be dismissed, with costs.

Application dismissed, with costs.

Solicitors—Gellatly, Son & Warton, for plaintiffs; Freshfields & Williams, for defendants.

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(10) 11 Cl. & F. 155.

1885. June 22, 30. } CRABTREE *v.* ROBINSON AND ANOTHER.

Trespass—Distress—Entry by raising higher a window open a few inches.

An entry into a house for the purpose of distraining was made by raising higher the sash of a window already open a few inches:—Held, *that the distress was legal.*

Rule *nisi* to set aside a judgment of the County Court of Yorkshire, holden at Otley, in favour of the defendants. The facts, so far as they need be stated, were as follows: The plaintiff claimed damages for illegal distress, complaining of illegal entry by a window. The defendants, who were the plaintiff's landlord and a broker employed by him, went, accompanied by a bailiff, to the plaintiff's house for the purpose of distraining for rent due from the plaintiff as tenant of the house. They found a kitchen window on the ground-floor partially open, whereupon they instructed the bailiff to enter; this he did by putting his legs over the sill of the window and raising the sash sufficiently to admit his body. Having thus entered the house, the bailiff opened the door, and the defendants went in and distrained the furniture. The County Court Judge held that the entry by the window was not illegal, and gave judgment for the defendants accordingly. He based his judgment on *The King* v. *Smith* (1), considering that if an entry by raising higher the sash of a window already partially open did not where there was a felonious purpose amount to a breaking into a house so as to support a conviction for housebreaking, it could not amount to a breaking into a house where the object was lawful.

Julian Robins shewed cause.—An entry to distrain may be by a window—1 *Roll. Abr.* (Distress M.) 671, citing a case between *The Master of the Temple and the Bishop of St. David's* (2).

The principle of *Semayne's Case* (3) does not apply where no violence at all is used. *The King* v. *Smith* (1) was rightly regarded by the County Court Judge as in point. In *Nash* v. *Lucas* (4) the window was shut, though not fastened.

He referred also to *Nixon* v. *Freeman* (5), *Ryan* v. *Shilcock* (6), *Gould* v. *Bradstock* (7), *Brown* v. *Glenn* (8), and *Hancock* v. *Austin* (9).

Morton Smith, in support of the rule.—Entry by raising a window, even although it is already open a few inches, is an illegal mode of entry to distrain. In *Nash* v. *Lucas* (4), Lush, J., said that entering a house by a window not being a usual mode of entry no licence to enter could be implied from a window being left unfastened, and that the ground of holding entry through a closed but unfastened door to be lawful was that access by the door being the usual mode of access, a licence from the occupier to any one to enter having lawful business might be implied from his leaving the door unfastened. It does not even appear here that the window was left open by the occupier.

[FIELD, J.—It seems immaterial whether the window was opened by the occupier himself or by a third person.]

No case has been found directly in point, but the principle of the cases is in favour of the plaintiff.

He referred to *Attack* v. *Bramwell* (10).

Cur. adv. vult.

The judgment of the Court (11) was delivered on June 30 by

MANISTY, J.—This is an appeal from a judgment of the Judge of the County Court of Yorkshire, holden at Otley. The action was for illegal distress; and the only question which we have to determine is whether the distress was illegal by reason of the fact that the entry to distrain was through a window which was already partly open, and was raised

(1) 1 Moo. C.C. 178.
(2) 1 Rot. Parl. 18 Ed. 1. 61, Ca. 192.
(3) 5 Co. Rep. 91.
(4) 8 B. & S. 531; Law Rep. 2 Q.B. 590.
(5) 5 Hurl. & N. 647; 29 Law J. Rep. Exch. 271.
(6) 7 Exch. Rep. 72; 21 Law J. Rep. Exch. 55.
(7) 4 Taunt. 562.
(8) 16 Q.B. Rep. 254; 20 Law J. Rep. Q.B. 205.
(9) 32 Law J. Rep. C.P. 252.
(10) 3 B. & S. 520; 32 Law J. Rep. Q.B. 146.
(11) Field, J., and Manisty, J.

by the persons distraining sufficiently to enable one of them to enter. The question is whether that was a breaking into the house rendering the distress illegal. It is clearly settled that if a window is down, whether it be fastened or not, an entry by it is a breaking in. It may seem somewhat strange that if a window is open a few inches an entry by it does not amount to a breaking in, however much the window may be raised by the person entering. But that also appears to be settled: we are agreed that the authorities are clear upon the point. *The King* v. *Smith* (1), which was referred to by the learned County Court Judge, is the only case to which we need refer. That was an indictment for housebreaking—whether by night or by day is immaterial. It was there held by the twelve Judges, that entering a house by raising a window, as was done here, did not amount to breaking into a house so as to justify a conviction for housebreaking. If that be the law as to an entry with a criminal purpose, how can a similar entry with a lawful purpose be held illegal? *Nash* v. *Lucas* (4) was mainly relied upon on behalf of the plaintiff, but does not touch the point arising here, the decision there being that entering by opening a window which was shut but not fastened was illegal. And upon all the cases, so far as we have examined them, it appears that if a window is open entry by it for the purpose of distraining is lawful.

In *Nash* v. *Lucas* (4) Cockburn, C.J., is reported to have said, "The authorities are limited in application either to the case where the door is shut but can be opened without violence, or where the window is open and can be entered without doing any violence;"—going on to say, "but if the window be shut you are doing violence if you open it" without the licence of the owner of the house. The window here being partially open the bailiff, I think, might lawfully do what he did.

Rule discharged.

Solicitors—Le Riche & Son, agents for Robinson & Robinson, Keighley, for plaintiff; H. Ikin, agents for Child & Groom, Otley, for defendants.

1885. May 8, 20. } THE NOTTINGHAM PATENT BRICK COMPANY *v.* BUTLER.

Vendor and Purchaser—Covenant running with the Land—Purchasers of several Plots of same Estate—Restrictive Covenants—Right of Purchasers to enforce inter se—Effect of Condition of Sale precluding Objection to Matters not disclosed at Time of Sale—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 3, *sub-s.* 3, *and s.* 11—*Deposit, return of.*

Where the same vendor selling to several persons plots of land, parts of a larger property, exacts from each of the purchasers covenants imposing restrictions on the use of the plots sold, without putting himself under any corresponding obligation, if the restrictions are merely matters of agreement between the vendor and the purchasers imposed for the vendor's own benefit, the purchasers of the several plots cannot enforce them inter se; but if the restrictions are meant for the common advantage of the several purchasers, such purchasers and their assigns may enforce them inter se for their own benefit.

Whether covenants imposing restrictions upon the use of plots of land, part of a larger property, entered into with the vendor by the purchasers of the several plots, are merely matters of agreement between the vendor and the several purchasers for the vendor's own benefit, or are meant to be for the common advantage of the several purchasers, is a question of fact.

A condition of sale of land providing that the property is sold subject to any matter or thing affecting the same, whether disclosed at the time of sale or not, does not relieve the vendor from the necessity of disclosing any incumbrance or liability of which he is aware or has the means of knowledge.

Sub-section 3 *of section* 3 *of the Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *merely applies to every sale the conditions therein set forth, but does not alter the effect of such conditions as established by law at the passing of the Act.*

Action tried in Middlesex before Wills, J., without a jury. The nature and facts of the case as found by the learned Judge sufficiently appear from the judgment.

Nottingham Brick Co. v. *Butler.*

Charles, Q.C., and *W. Graham*, for the defendant, submitted that the purchasers of the original lots would not be entitled to enforce the restrictive covenants against the plaintiffs, as there was no contract that the purchasers should have the benefit of those covenants, and they were not mentioned in the contract for sale to the plaintiffs. They cited *Renals* v. *Cowlishaw* (1), *Keates* v. *Lyon* (2), *Master* v. *Hansard* (3), and *The Duke of Bedford* v. *The Trustees of the British Museum* (4). They also submitted that the defendant was not bound to disclose the existence of the restrictive covenants. *Dart's Law of Vendors and Purchasers*, 5th ed. vol. i. pp. 134 *et seq.*, and the Conveyancing and Law of Property Act, 1881, s. 3, sub-s. 3, and s. 11, were referred to.

Sir Farrer Herschell, Q.C., Mellor, Q.C., and *R. Bray*, for the plaintiffs, contended that the restrictive covenants at the original sale enured for the benefit of all the purchasers, and each purchaser might enforce them against the others—*Western* v. *McDermott* (5), and *Nicoll* v. *Fenning* (6)—and subsequent purchasers with notice were bound by the original covenants—*Wilson* v. *Hart* (7) and *Patman* v. *Harland* (8). They also contended that the plaintiffs were not precluded by the conditions of sale from refusing to complete by reason of the flaw in the defendant's title—*Heywood* v. *Mallalieu* (9).

Charles, Q.C., in reply, distinguished *Heywood* v. *Mallalieu* (9), on the ground that in that case there was fraud on the part of the vendor.

Cur. adv. vult.

(1) 48 Law J. Rep. Chanc. 33, 830; Law Rep. 9 Ch. D. 125; ibid. 11 Ch. D. 866.
(2) 38 Law J. Rep. Chanc. 357; Law Rep. 4 Chanc. 218.
(3) 46 Law J. Rep. Chanc. 505; Law Rep. 4 Ch. D. 718.
(4) 2 Myl. & K. 552; 2 Law J. Rep. Chanc. 129.
(5) 36 Law J. Rep. Chanc. 76; Law Rep. 2 Chanc. 72.
(6) 51 Law J. Rep. Chanc. 166; Law Rep. 19 Ch. D. 258.
(7) 35 Law J. Rep. Chanc. 569; Law Rep. 1 Chanc. 463.
(8) 50 Law J. Rep. Chanc. 642; Law Rep. 17 Ch. D. 353.
(9) 53 Law J. Rep. Chanc. 492; Law Rep. 25 Ch. D. 357.

WILLS, J. (on May 20), delivered judgment.—The plaintiffs sue the defendant to recover the sum of 610*l.* paid by the plaintiffs to the defendant as a deposit upon the intended purchase by the plaintiffs from the defendant of a piece of land.

The land in question was put up for sale by auction on the 26th of September, 1882, but was not sold at the auction. Immediately afterwards the plaintiffs, by their solicitor, Mr. Hind, entered into negotiations, first with the auctioneer, and then with the defendant himself, in the course of which the defendant told Mr. Hind that there were restrictive covenants applicable to the land which would prevent its being used as a brick-field. The defendant's solicitor, Mr. Gilbert, who was present, was appealed to by Mr. Hind as to whether this was correct. He replied that he was not aware of any. Thereupon the defendant said he had seen the restriction in one of the old deeds; and, upon Mr. Hind repeating his appeal, Mr. Gilbert again answered that he was unaware of any restrictions. Mr. Gilbert did not add that without which his answers were misleading—namely, that he had not read the earlier deeds and knew nothing of their contents. One of the directors of the plaintiffs' company who was present thereupon signed, on behalf of the plaintiff company, a contract to purchase the piece of land at the price of 6,100*l.*, and a deposit of ten per cent. was paid to the defendant.

The contract contained a description of the piece of land proposed to be sold, but was silent as to its being subject to any restrictions upon the full proprietory rights of the purchaser of a freehold, and also contained the following conditions:—

"4. The property is sold subject to all tenancies, tenant rights, chief and other rents, tithe, rights of way, water, light and other easements, and also to an arrangement entered into with the Nottingham Waterworks Company for removing from time to time and laying down along the private road called Plains Road new main water-pipes, and also to the payment of a rateable proportion of the expense of keeping the said private road and gate at the end thereof next Mapperley Plains in good condition, and also subject to any matter or thing

affecting the same, whether disclosed at the time of sale or not.

"10. The title shall commence with an indenture of conveyance dated the 20th of May, 1868, and made between Henry Conway Barnett of the first part, Harriett Maltby, spinster, of the second part, and William Winsley of the third part.

"12. The property is believed to be and is to be taken as correctly described, and any incorrect statement, error, or omission found in the particulars or these special conditions is not to annul the sale nor entitle the purchaser to be discharged from his purchase, nor is the vendor or purchaser to claim or be allowed any compensation in respect thereof."

About the 9th of December, 1882, the plaintiffs discovered that the property so bought was one of a number of bits of land which had in the years 1865, 1866, and 1867 been sold by the same vendor to different purchasers, subject in each case to conditions imposing restrictions on the cost and details of construction of any house to be built upon the land bought, and forbidding the use of it for various purposes of trade or manufacture, and especially of a brick-yard or for making bricks.

The plaintiffs thereupon, after some correspondence, of which it is unnecessary to go into the details, threw up the purchase, and brought their action to recover the deposit they had paid.

I will dispose at once of the conversation which preceded the signing of the contract. Assuming that the land was subject to the restrictions in question, I think the conduct of Mr. Gilbert would have been sufficient, if the defendant were responsible for it, to have avoided the contract altogether. The evidence for the plaintiffs put it in a light still less favourable than the version I have given, which is that narrated by Mr. Gilbert himself; but it is not necessary to discuss the discrepancies upon this point. Upon his own shewing Mr. Gilbert's answers were disingenuous, and could not fail (if relied upon) to mislead the plaintiffs; and had they been given by the defendant I should have no hesitation in saying that a contract so procured could not stand. But both sides are agreed that the defendant himself was perfectly honest in the matter, and told all that he knew about the restrictive conditions; and under the circumstances it is impossible to treat Mr. Gilbert as the agent of the defendant to make the statements in question—whether Mr. Gilbert's version or Mr. Hind's be adopted. The conversation, therefore, seems to me to leave the matter just where it would have been had no such conversation passed. The contract having been signed speaks for itself, and defines the rights of the parties; and whatever might be the effect of the notice thus given to the intending purchaser of the restriction as to the use of the land as a brick-field, it is clear that no mention was made of the other equally material restrictions, and it is also clear upon the evidence that until the beginning of December, 1882, the plaintiffs had neither knowledge nor notice of them.

It appeared that the plot in question (containing about six and a half acres) was part of a property of about forty-two or forty-three acres which was on the 24th of March, 1865, put up for auction in thirteen lots. Amongst the conditions of sale were the following:—

"15. All buildings to be erected on any part of the said lands shall be stone-coloured, with slated roofs, and no building to be occupied as a public-house, or workshop, or blacksmith's shop, or as a butcher's shop, or slaughter-house, or chandler's house or shop, or as a shop for the sale of any article whatsoever, or for the purpose of using, working, or making any article of manufacture therein, shall be erected, or built, or used upon any part of the land now offered for sale, nor shall any part thereof be used as a brick-yard or for the making of bricks, except lot 13; and, in case the property shall be sold in lots, no house shall be erected on any part of the said land, except on lot 13, at a less cost than 400*l.*

"16. The purchaser of the property, or of each lot, in case the same shall be sold in lots, shall enter into all such covenants with the vendors as the vendors' counsel shall deem necessary or proper for securing the performance of these conditions on the part of such purchaser, which covenants shall be inserted in his deed of conveyance, and he shall also, in conjunction with the

other purchasers (if any), enter into and execute a separate deed containing like covenants with the vendors, such separate deed being prepared at the expense of the vendors, but perused on behalf of such purchaser or purchasers respectively, and executed at his or their expense."

At this sale lots 1, 2, and 12 were sold.

In February, 1866, there was a second auction, at which lots 6, 7, and 8 were sold.

In October, 1867, there was a third auction, at which lots 9 and 10 were sold.

I am satisfied upon the evidence that the whole of these lots were sold upon the same terms. The solicitor and auctioneer who conducted the sales both believe that the conditions were the same. The solicitor, who produced his bill-book containing an elaborate history of the dealings with the property, had in it no charge for altering the conditions on the occasion of the second or third sale. The same person purchased lots 1, 6, 7, 8, and 12. His deed of purchase of lot 8, sold at the second sale, and lot 12, sold at the first sale, were produced, and both contained the restrictive covenants in question. The deeds of purchase of lots 9 and 10 sold at the third auction were also put in, and they contained the same covenants. Lot 2 was sold at the first auction, but there was no direct evidence of the terms of the conveyance. Lots 3, 4, and 5 were sold in 1865, 1866, and 1867, by private contract to various purchasers, and there was no evidence as to the terms upon which they were sold. Lot 11 (the lot contracted to be purchased by the plaintiffs in 1882, and now in question) was sold by private contract, and the deed of sale bearing date the 4th of September, 1866, contained the restrictive conditions. Lot 13 was sold by private contract in June, 1866, and the deed by which it was conveyed contained, with the exception of a permission to build a blacksmith's shop, such of the restrictions as were applicable to lot 13. That lot was then a brick-field, and the permission to build a blacksmith's shop was under the circumstances a matter of the smallest possible consequence to any person interested in the observance of the restrictions. I entertain, therefore, no doubt that the whole of the lots sold at the three auctions were sold subject to the restrictions in question, as well as lot 11 and (with the modification of them above mentioned) lot 13, both of which were sold by private contract; and as to lots 8, 9, 10, 11, 12, and 13 the matter was placed beyond a doubt by the production of the deeds by which the common vendor conveyed to the various purchasers. Some of the persons who had bought from the original vendor were shewn to have resold without any restrictions being mentioned in the deeds by which they conveyed to their respective purchasers. Lots 2 and 3, part of lot 4, and lot 11 were shewn to have been so dealt with. On the other hand, lots 8, 9, 10, and 12 were shewn to have been sold by every successive vendor by deeds containing the restrictions, and it appeared that every house that has been built upon any part of the original estate has conformed to the covenant as to cost, and in fact to the covenant as to colour—that is to say, the fronts of all the houses have been white, though in some instances the backs, and in many instances the stables, have been red. No shop or building for manufacture has been put up on any of the lots, and none has been used as a brick-field. Most of the houses have been slated. Under these circumstances the plaintiffs contended that they were not bound to complete their purchase, that they had bought a property which was in fact subject to serious restrictions upon its profitable use by a contract which contained no reference to the restrictions, and that there was nothing in the contract to prevent them from taking advantage of this objection.

On behalf of the defendant it was argued that there were no restrictive conditions applicable to the property bought by the plaintiffs; and that if there were, the plaintiffs were precluded by the conditions cited from raising the objection; and it was said that this contention was supported by the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 3, sub-s. 3. Three questions appear to me to arise—first, whether the plaintiffs, as purchasers, were bound by the restrictive covenants contained in the deed of the 4th of September, 1866, which was the root of the defendant's title. Secondly, whether there was any

one entitled to enforce those covenants against them. And thirdly, whether they were precluded by the conditions of their contract from insisting upon the objection. Upon the first question it appears to me to be abundantly clear upon the authorities that a purchaser with notice of such restrictive covenants is bound by them. The cases are collected in *Dart on Vendors*, 5th ed., p. 767, and to them may be added *Wilson* v. *Hart* (7) and *Patman* v. *Harland* (8). Indeed, this point was hardly seriously contested in the very able argument of Mr. Charles. The second presents much more difficulty: Was there any one in the present case entitled to enforce as against the plaintiffs, had they become the purchasers of lot 11, the restrictive covenants in question?

The principle which appears to me to be deducible from the cases is, that where the same vendor selling to several persons plots of land, parts of a larger property, exacts from each of them covenants imposing restrictions on the use of the plots sold, without putting himself under any corresponding obligation, it is a question of fact whether the restrictions are merely matters of agreement between the vendor himself and his vendees imposed for his own benefit and protection, or are meant by him and understood by the buyers to be for the common advantage of the several purchasers. If the restrictive covenants are simply for the benefit of the vendor, purchasers of other plots of land from the vendor cannot claim to take advantage of them. If they are meant for the common advantage of a set of purchasers, such purchasers and their assigns may enforce them *inter se* for their own benefit. Where, for instance, the purchasers from the common vendor have not known of the existence of the covenants, that is a strong, if not a conclusive, circumstance to shew that there was no intention that they should enure to their benefit. Such was the case in *Keates* v. *Lyon* (2), *Master* v. *Hansard* (3), and *Renals* v. *Cowlishaw* (1). But it is in all cases a question of intention at the time when the partition of the land took place, to be gathered, as every other question of fact, from any circumstances which can throw light upon what the intention was—*Renals* v. *Cowlishaw* (1). One circumstance which has always been held to be cogent evidence of an intention that the covenants shall be for the common benefit of the purchasers is that the several lots have been laid out for sale as building lots, as in *Mann* v. *Stephens* (10), *Weston* v. *McDermott* (5), and *Coles* v. *Sims* (11); or, as it has been sometimes said, that there has been "a building scheme"—*Renals* v. *Cowlishaw* (1). In some instances the exhibition to intending purchasers of a plan embodying such a scheme has been relied upon. Obviously, however, this is a mere detail of evidence, and is by no means necessary in order to establish the existence of such a scheme. It appears to me that where land is put up to auction in lots, and two or more persons purchase according to conditions of sale containing restrictions of the character of those under consideration in the present case, it is very difficult to resist the inference that they were intended for the common benefit of such purchasers: especially where the vendor proposes (as in the present case) to sell the whole of his property. Where he retains none, how can the covenants be for his benefit, and for what purpose can they be proposed except that each purchaser, expecting the benefit of them as against his neighbours, may be willing on that account to pay a higher price for his land than if he bought at the risk of whatever use his neighbour might choose to put his property to? Where, therefore, the vendor desires to sell at the auction the whole of his property, the inference is strong that such covenants are for the common benefit of the purchasers, and it seems to me that the strength of this evidence is not diminished by the fact that at the sale a considerable number of the lots may fail to find purchasers. In the present instance the vendor put up the lots for sale by auction three times, and always on the same conditions. Is it possible to doubt that he intended, and that the purchasers understood, that the covenants should enure to the benefit of every purchaser? The inference is strengthened in this case by the fact that, so far as has been ascertained one way or the other, the purchasers by

(10) 15 Sim. 377.

(11) Kay, 56; 5 De Gex, M. & G. 1.

private contract of the lots not sold by auction were, with an exception so trifling as hardly to be worth notice, put under the same restrictions, and by the fact that the most important of the restrictive covenants have for nearly twenty years been observed by the several purchasers and their assigns. In *Western* v. *McDermott* (5) very little weight was given by the Lord Chancellor to the fact that in some minor particulars no one of the several purchasers had thought it worth while to insist upon the performance of the covenants; and so here I am not disposed to attach any importance to the fact that the covenant as to the colour of the buildings to be erected on the plots sold, and as to the slate roofing, have not been in all respects strictly adhered to.

I come to the conclusion, therefore, that these covenants were meant by the vendor to be for the benefit of purchasers generally, that certainly the purchasers at the several auctions, and probably all those who bought by private contract, were aware that the other lots were being sold or would be sold upon the same terms, and that they bought on the faith that these conditions would be observed all over the property of the common vendor. If so, the purchasers of most, if not all, of the thirteen lots comprised in the particulars of sale of 1865, other than lot 11, were entitled to the benefit of the restrictive covenants entered into by the purchaser of lot 11. It is clear upon the authorities that their assigns have the same rights as the original purchasers, and there were therefore persons who could have enforced against the plaintiffs, had they completed their purchase, the restrictive covenants in question. The plaintiffs, therefore, are *prima facie* relieved from the obligation to fulfil the contract; and it remains only to consider the third question—namely, whether the conditions of the contract preclude them from taking the objection.

The 4th condition provides that the property is sold subject to any matter or thing affecting the same, whether disclosed at the time of sale or not. Such a condition, however, does not relieve the vendor from the necessity of disclosing any incumbrance or liability of which he is aware, but simply protects him if it should afterwards turn out that the property is subject to some burden or right in favour of a third person of which he is unaware—*Dart on Vendors*, 5th ed. p. 156. It would be nothing short of a direct encouragement to fraud if a vendor were at liberty by a condition of this kind to sell to a purchaser, as an absolute and unburdened freehold, a property which he knew to be subject to liabilities which would materially reduce its market value. In the present instance the vendor knew of some of the restrictions, and had the means of knowledge of all of them, and he cannot escape from the necessity of fairly disclosing them by omitting to make himself acquainted with his deeds or by forgetting their contents. In honesty and in law alike, he was bound to give the purchaser full and fair information what it was he had for sale and was inviting him to buy; and, having failed to do so, he cannot insist upon the bargain procured by the suppression of material matters affecting the nature of the subject of sale. I entirely acquit the defendant of anything like intentional misconduct; but in the preparation of the particulars of sale he unfortunately relied upon his solicitor, who, as I cannot help believing, was under the mistaken impression that he could better the position of the vendor by abstaining from making himself acquainted with the contents of the earlier deeds in his possession and open to his perusal.

The 10th condition provided that the title shall begin with a deed of the 20th of May, 1868, subsequent to that which contained the restrictive covenant in question. It is clear, however, that such a condition does not preclude the purchaser from raising a well-founded objection to the title arising from facts which he has discovered from collateral sources —*Waddell* v. *Wolfe* (12).

The 12th condition provides that any error or omission in the particulars is not to annul the sale nor to entitle the purchaser to compensation. It is, however, settled law that such a condition will not protect the vendor where the misdescription, being of such a nature as but for the

(12) 43 Law J. Rep. Q.B. 138; Law Rep. 9 Q.B. 515.

condition would avoid the contract, is due to the wilful reticence or negligence of the vendor—*Sugden*, 28; *Dart*, 5th ed. 134.

In *Heywood* v. *Mallalieu* (9) property had been sold under conditions practically the same as the three relied upon by the defendant in the present case. The purchaser discovered that it was subject to an easement undisclosed by the particulars of sale. The vendor knew of the easement. It was held by Vice-Chancellor Bacon that he could not insist upon the sale, and that the purchaser was entitled to recover the deposit he had paid. Upon the points now under discussion *Heywood* v. *Mallalieu* (9) seems undistinguishable from the present case, and is a distinct authority in favour of the plaintiffs.

It was contended, however, that greater efficacy is given to conditions such as these which I have discussed by the Conveyancing Act of 1881 (44 & 45 Vict. c. 41), s. 3, sub-s. 3. This enactment, however, is a mere legislative application to every sale of a condition of the same general character as those under discussion, and there can, as it seems to me, be no reason for giving to it a meaning which would amount to a legislative repeal of doctrines established at the date of the passing of that Act by numerous decisions and by the thoroughly settled practice of conveyancers. On the contrary, sub-section 11 of the same section shews clearly that it was not intended to have any such effect, or to qualify the principles upon which the Courts were at that time in the habit of acting in granting or refusing specific performance in such cases.

I have come, therefore, to the conclusion that the plaintiffs are justified in refusing to complete their purchase, and entitled to a return of their deposit, and my judgment must be for the plaintiffs for the sum of 610*l.* and costs.

Judgment for plaintiffs, with costs.

Solicitors—Torr, Janeways, Gribble & Oddie, agents for Wells & Hind, Nottingham, for plaintiffs; Aldridge, Thorn & Morris, agents for Towle, Gilbert & Sons, Nottingham, for defendant.

1885. July 7. RICHARDS v. THE WEST MIDDLESEX WATERWORKS COMPANY AND NEWTON.

Waterworks Company — Distress — Waterworks Clauses Consolidation Act, 1845—*Recovery of Rates—Power to distrain under Private Act — Subsequent Public Act.*

A private Act passed in 46 *Geo.* 3 *gave the West Middlesex Waterworks Company power to levy a distress on default of payment by consumers of water of the water rates mutually agreed upon in accordance with* 46 *Geo.* 3. *c.* cxix. *s.* 59. *By an Act passed four years later the company were empowered to charge a reasonable amount for the water, but there was no express enactment as to the mode of recovering that amount. Subsequently to the Waterworks Clauses Consolidation Act*, 1845, *another private Act*, 15 *&* 16 *Vict. c.* clix., *was passed, in part incorporating that Act, but expressly stipulating that, "except as by this Act is expressly provided, this Act or anything therein contained shall not repeal, alter, interpret, or in any manner affect any of the provisions in force at the commencement of this Act, of the recited Acts, or any of them; and, except only so far as is requisite for the execution of this Act, all those provisions, and all powers, privileges, exemptions, and immunities of or for the benefit of any person or corporation thereby respectively created, conferred, or saved shall be and continue as valid and effectual as if this Act had not passed." The Act of* 46 *Geo.* 3 *was therein recited. The company issued its warrant of distress on the plaintiff's premises, and he brought an action for illegal distress:*—Held, *on appeal from a nonsuit by the learned Judge, that the power of the company to distrain was not taken away either inferentially by the Waterworks Clauses Consolidation Act*, 1845, *or expressly by the subsequent private Act incorporating that Act.*

This was a motion for a new trial on the ground of misdirection by the learned Judge (Huddleston, B.) in an action for trespass and assault. The plaintiff was indebted to the defendant company for arrears of rates for water supplied by

them, and the waterworks company put in a distress on his premises for the amount. One bailiff had already entered, and upon another man coming in the plaintiff remonstrated. The second man thereupon assaulted the plaintiff. The learned Judge held that the action for trespass would not lie, as the company were entitled under their private Act to distrain in a summary way; and, further, that there was no cause of action against the company for the assault, because the man who committed the assault was not acting within the scope of his authority.

Castle, for the plaintiff, in support of the motion.—The action for trespass will lie. The right of distress given by 46 Geo. 3. c. cxix. is taken away, because it was only given when there was a mutual agreement as to the amount payable, and the later Act of 50 Geo. 3. c. cxxxii. takes away the right to make agreements as to the amount of the rates payable, and provides that the sum charged shall be reasonable. The subject-matter of the distress is therefore changed, and it requires express enactment, which here there is not, to give the power of distress for this new rate. The public Act of 10 Vict. c. 17 is so inconsistent with this power in its provisions as to the right to levy and enforce payment of the rates, that it must be taken to abrogate the power given by the private Act—*Parry* v. *The Croydon Commercial Gas Company* (1). By section 74 of that Act, if a person supplied with water neglect to pay, the water may be cut off, and the arrears recovered, together with expenses and costs, "in the same manner as any damages for the recovery of which no special provision is made are recoverable by this or the special Act." By section 85, "damages for the recovery of which no special provision is made" are recoverable under the Railways Clauses Consolidation Act, 1845, and that lays down the procedure which is alone now open to them. It is true that in 1852 an Act, 15 & 16 Vict. c. clix., was passed, and that in section 48 there is a kind of saving clause; but that does not save the rights of the company whom it does not mention, and cannot be held to have been intended to keep alive this power of distress. Secondly, the company are liable for the excessive violence of their servant, even if they had a right to distrain.

Poland (with him *Earle*), for the company, and

L. Glyn, for Newton, the first bailiff, were not called upon.

Lord Coleridge, C.J.—In this case I think the nonsuit was right. The plaintiff was debtor to the defendants for rates, and they put in a distress on their own warrant for the amount due. The plaintiff objected to more than one man coming in, and was assaulted by the second man to whom he objected. Two points were made on behalf of the plaintiff, the latter of which I shall deal with first. It is said that whatever the rights of the company might be, they were bound to exercise them without excessive violence. That is undoubtedly true, and the master is liable for the acts of a servant in excess of what is necessary when the servant is acting within the scope of his employment. In this case, however, I do not think that the servant was acting within the scope of his employment, since the plaintiff was not interfering with the distraint. There is therefore no remedy against the servant's employers, and the nonsuit is right upon that point.

The other point was a more complicated one, and I think that the effect of the Acts cited shews clearly that the Judge was right. The Act 46 Geo. 3. c. cxix. was passed empowering the defendant company to make agreements for the supply of water, and section 59 of that Act gave them power in default of payment to recover the rates due by distress and sale, as in the case of rents reserved on common demises. The question is, does that power still remain. The Act of 50 Geo. 3, which gives the company power to charge customers what is reasonable, says nothing about the power of distress; but counsel for the plaintiff was driven to contend on his behalf that by the true effect of this legislation the power of distress was gone, because the subject-matter—namely, rates payable under agreement—was taken away. That I cannot agree to, and the latter

(1) 11 Com. B. Rep. N.S. 579.

statute has no such operation. I think it intended to alter the mode of ascertaining the subject-matter without taking away the right to distrain. It was also contended that as by 10 Vict. c. 17. s. 74, if a person supplied with water neglect to pay the rates, the undertakers may recover the rates, expenses, and costs "in the same manner as any damages for the recovery of which no special provision is made are recoverable by this or a special Act," and as by section 85 the clauses of the Railway Clauses Consolidation Act, 1845, with respect to the recovery of damages not specially provided for, are incorporated with this and the special Act, therefore the rates, costs, and expenses are recoverable, by reason of section 85, by the process laid down in section 140 of the Railway Clauses Consolidation Act, in cases where the method of ascertaining the amount or enforcing of payment of any damages, costs, or expenses directed to be paid by that Act or the special Act, or any Act incorporated therewith, is not provided for. But here there is an Act of 1852 which keeps alive the provisions of 46 Geo. 3 by treating it as an existing Act, and section 48 of that Act expressly provides that the powers and privileges given by the recited Acts shall not be affected by that Act. It appears to me, therefore, that there being no express repeal in the public Act, and in the later private Act an express dealing with it as not repealed, we ought to have no hesitation in coming to the conclusion that the company's power to issue a warrant of distress which is given by 46 Geo. 3 has never been taken away, and the nonsuit is therefore right.

SMITH, J., concurred.

Motion refused, with costs.

Solicitors—Trevin & Nash, for plaintiff; Baileys, Shaw & Gillett, for the defendant company; W. E. Ruddle, for Newton.

BANKRUPTCY. 1885. August 12.

In re PLAYER; *ex parte* J. F. HARVEY (No. 1).

Bankruptcy — Settlement—Transfer of Shares to Son—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 47, *sub-ss.* 1 *and* 3.

The bankrupt, in 1880, *handed to his son a sum of money to be invested in shares in a ship, which was so invested by the son. The shares were afterwards sold by the son for* 450*l.*, *which sum he handed over to his sister upon a sort of implied trust for the benefit of their father and mother*:—Held, *that handing the sum for investment was a conveyance or transfer of property within the meaning of* 46 & 47 *Vict. c.* 52. *s.* 47, *sub-s.* 3.

This was a motion by way of appeal from the decision of the deputy Judge of the County Court at Swansea, on an application by the trustee in the bankruptcy of Edward Player for an order declaring that a gift to C. E. Player, made by the bankrupt in or about the year 1880, of a sum of money to purchase certain shares in the ship *Abercarn* by C. E. Player, subsequently sold for a net sum of 450*l.*, was void against the trustee under the 47th section of the Bankruptcy Act, 1883, and that C. E. Player and C. H. Player, or one of them, should pay to the trustee the sum of 450*l.* and costs. The deputy Judge refused to make the order, and the trustee appealed.

The evidence given in support of the application shewed that in March, 1880, the bankrupt bought, in the name of and through his son C. E. Player, certain shares in the ship *Abercarn*, the dividends on which were always received by the said C. E. Player; and the latter sold the said shares for the sum of 450*l.*, which he thereupon gave to his sister, C. H. Player, upon a sort of implied trust for the benefit of their father and mother, who were living apart. No consideration was paid by C. E. Player for these shares.

Cooper Willis, Q.C. (*F. C. Willis* with him), for the appellant.—This is a settlement within the meaning of section 47 of the Bankruptcy Act of 1883 (1), as defined

(1) 46 & 47 Vict. c. 52. s. 47: "Any settlement of property, not being a settlement made

by sub-section 3 of that section (1). It is a transfer of property. Admitting that if a sum of money only had been given, and there were no means of tracing it, this would not perhaps come within the definition; in this case the shares were in fact transferred, and the property can therefore be recovered. By the interpretation clause, section 168 (1), property is defined, *inter alia*, as "money." This is therefore a transfer of money, and being made within the prescribed time is void under section 47 (1).

Percy Gye, for the respondents.—Section 47 is not retrospective, in the absence of any express declaration to that effect. A settlement does not include a payment of money, as is clear from section 48, which expresses "every payment made" as being within it. Had it been intended to include money paid, such words would have been added in section 47. Otherwise all preceding gifts, such as for education or advancement of children within ten years of the bankruptcy, would have to be refunded by the bankrupt or those to whom they were made.

MATHEW, J.—It is said in this case that the payment by the father to his son for the purposes of investment of this sum is void under section 47 of the Bankruptcy Act, 1883 (1). Against this contention, however, it was argued in the first place that this section was not retrospective, and does not apply to transfers or settlements made previously to this Act. But the section in question is in substitution for and identical in terms with a section in an earlier Act. It has been over and over again successfully contended that the later Act in such a case is to be read with the earlier; and not to do so, in fact, would result in there being a period when neither Act applied. It is plain, therefore, that the later Act is in substitution for the earlier, and, except in so far as it varies the former, is retrospective. The language of the Act also clearly shews that the new section takes up the old, as it were, and includes all settlements. On behalf of the respondents it is contended that we should practically read in the words "except settlements made before the passing of this Act." This we cannot do, and it would be contrary to all canons of construction. Then it is said this is not a transfer of property within the section as interpreted by sub-section 3. But the money was given to the son to be invested in shares, and the shares were in the son's name. I have, therefore, no doubt in deciding that this is such a transfer of property as is contemplated in section 47, and therefore void as against the trustee.

CAVE, J., and WILLS, J., concurred.

Appeal allowed, with costs.

Solicitors—Tamplin, Tayler & Joseph, agents for Stricks & Bellingham, Swansea, for appellant; Smith & Lawrence, agents for Smith, Lawrence & Smith, Swansea, for respondents.

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before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in the bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement, be void against the trustee in the bankruptcy, unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof."

Sub-section 3: "'Settlement' shall, for the purposes of this section, include any conveyance or transfer of property."

Section 168: "'Property' includes money . . . ."

BANKRUPTCY. 1885. August 12. } *In re* PLAYER; *ex parte* J. F. HARVEY (No. 2).

Bankruptcy — Settlement — Advance to Son to start a Business — Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 47, *sub-ss.* 1 *and* 3.

The bankrupt, in or about 1882, *more than two years before bankruptcy, advanced to his son E. O. Player the sum of* 650*l. to purchase building stock and set up in business. E. O. Player found* 150*l. for capital, and carried on the business, and*

at the date of the bankruptcy was possessed of stock and capital to the value of about 500*l.* :—Held, *that this was not a voluntary settlement under section* 47 *as interpreted by sub-section* 3 *of that section.*

This was a motion by way of appeal from the decision of the deputy Judge of the County Court at Swansea dismissing an application by the trustee in the bankruptcy of Edward Player for an order declaring that an advance of 650*l.* made by the bankrupt more than two years before the bankruptcy to his son E. O. Player for the purchase of certain building stock, &c., to enable the son to carry on business was void as against the trustee under section 47 of the Bankruptcy Act, 1883 (1), and that the said E. O. Player should repay to the trustee the said sum of 650*l.* The deputy Judge having refused to make the order, the trustee appealed.

It appeared from the evidence that E. O. Player put 150*l.* capital of his own moneys into the business, which he carried on for his own benefit, living with his father during the time, and that at the time of the bankruptcy the whole amount of the stock and capital remaining in the business was worth about 500*l.*

Cooper Willis, Q.C. (*F. C. Willis* with him), for the appellant.—Though it is contended that this is a voluntary settlement within the 47th section of the Bankruptcy Act, the trustee is willing to give E. O. Player credit for 150*l.* put into the business by him, and take 200*l.* as equivalent to the balance.

[The Court here intimated that the trustee must make out his claim to any of the capital of the business.]

This is a transfer of "money" which is included by the interpretation clause, section 168 (1), in "settlement." And as in the case of purchase of shares for a son it can be traced. It was put into the business, and formed the greater part of the capital of the business. After deducting what was put into it by the son, the remainder represents the stock, &c., into which this money was converted, and it is therefore possible to trace it, although of course the actual stock may have changed. Still it represents part of the original advance.

Percy Gye, for the respondent.—There is clearly nothing of the advance left. The stock has changed, and there is no way of tracing the original moneys. The son too is entitled to say that this is earned by himself and that the original 650*l.* is all gone.

MATHEW, J.—I am of opinion that this appeal must fail. It is contended that the trustee is entitled to follow a sum of money advanced by a father more than two years before his bankruptcy to his son to set him up in business, and that if at the time of the bankruptcy any part of the capital can be shewn to be left it ought to be declared to belong to the trustee as having been advanced by way of voluntary settlement. The trustee offered to give credit to the son for what he put into the business and take a part only of the balance. This offer is singularly moderate when we consider that if right in the contention made on his behalf the trustee is entitled to the whole amount of capital remaining. But I think he is asking for what the Act does not give him.

This is clearly a gift of money to be employed in a venture, and that I think to be outside the section which it is said

(1) 46 & 47 Vict. c. 52. s. 47, sub-s. 1: "Any settlement of property, not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer, in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in the bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement, be void against the trustee in the bankruptcy, unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof."

Sub-section 3: "'Settlement' shall, for the purposes of this section, include any conveyance or transfer of property."

Section 168: "'Property' includes money . . . ."

makes this void because it is a voluntary settlement. If the section were to be read as including such a transaction as this, it would interfere most seriously with many commercial transactions. The only argument that can be put forward in favour of such a contention is that in section 47 the word "property" is used. But I do not think the section was intended to include a gift of money, but what was I think meant was that when money is settled as property it may be recovered as property would be recoverable. To hold that every gift of money made within ten years of bankruptcy by a man at the time in insolvent circumstances, in the absence of fraud which would render it void under the statute of Elizabeth, is void, would be to upset innumerable transactions that are entered into every day in the commercial world. But it was said that here the money could be followed. But such a following is clearly not meant by the section, for it might involve tracing it through endless transactions for the whole ten years. And it is quite a question in this case, as it manifestly would be in a case of a greater number of years elapsing between the gift and the bankruptcy, whether the balance left is not part of the profits made by the son by his own industry after the original capital had been expended. It clearly then could not be traced. Therefore the appellant fails in his contention.

CAVE, J.—I am of the same opinion, which is strengthened if we look at the history of the legislation on this subject. Previously to the Act of 1869 the word "money" did not occur in the statutes; and the case of *Ex parte Sharland* (2) decided that a mere gift by way of advancement to a son was not void by 1 Jac. 1. c. 15. s. 5, where the words used are, "convey, or procure, or cause to be conveyed." In *Kensington* v. *Chanker* (3) money advanced and boats given to a son to start him in business were held not to be void as a voluntary settlement. There Lord Ellenborough says, "the doctrine contended for would go the length of making a son liable to refund every portion of money given to him by his father for his maintenance." In the Act of 1849 the word "money" does not appear, but what is obviously contemplated is a continued existence of the thing assigned. Then the section in the Act of 1869 is substantially similar to section 47 of the Act of 1883 (1), in which the word "settlement" is declared by the interpretation clause (1) to mean any transfer of property. Property, it is said, in both Acts includes money, and therefore every gift to a child is liable to become void by being followed within ten years by the bankruptcy of the father. It would be a very strong measure so to construe this section, and give so extensive an effect to a word not in the section, but only in the interpretation clause, as to go further than any former Acts have done. Looking at the words of the Act I do not think this is the right construction. What is meant is that "settlement" is not to be confined to a regular settlement with trusts declared and other usual attributes of a formal settlement, but may include any mere transfer of property where the object is to preserve the property, whatever its form, for the enjoyment of another person. Therefore, as in the other case before us to-day, a purchase of shares to be enjoyed by the son is within the meaning of the word "settlement." But where a sum of money, *ex. gratia*, for maintenance is made to be expended at once it is not what was aimed at by previous Acts; and I do not see my way, did I so desire, to give to this section so extended a meaning as compared with previous enactments, because of a word inserted in the interpretation clause, as to bring about the result that every gift to a child would be void if the father became bankrupt within ten years.

WILLS, J., concurred.

Appeal dismissed, with costs.

Solicitors—Tamplin, Tayler & Joseph, agents for Stricks & Bellingham, Swansea, for appellant; Smith & Lawrence, agents for Smith, Lawrence & Smith, Swansea, for respondent.

(2) 7 Ves. 88.
(3) 2 M. & S. 36.

[IN THE COURT OF APPEAL.]

BANKRUPTCY. 1885. July 17. } *In re* MARSH; *ex parte* MARSH.*

Bankruptcy—Taxation of Costs—Cost of Taxation—Solicitors Act (6 *&* 7 *Vict. c.* 73), *ss.* 37 *and* 39.

There is no practice in bankruptcy by which a creditor reducing the bill of the trustee's solicitor by more than one sixth is entitled to the costs of the taxation, and the Solicitors Act (6 *&* 7 *Vict. c.* 73), *ss.* 37 *and* 39, *does not apply.*

Appeal from Mr. Registrar Murray refusing to order that Mr. A. E. Rosenthal and Messrs. Radcliffe, Cator & Martineau, solicitors, should respectively pay the cost of the taxation of their bills of costs incurred by them as solicitors of the bankrupt's trustee, and taxed under a common order at the instance of the wife of the bankrupt, one of his creditors. The bill in each case was reduced by more than one sixth, but the Registrar expressed the opinion that such an application for costs was unknown in respect of the bills of the solicitors of trustees in bankruptcy.

Woodfall, for the appellant.—The Solicitors Act (6 & 7 Vict. c. 73), ss. 37, 38, and 39, applies. A creditor of a bankrupt is "a person chargeable" with the bill of the solicitor of the trustee in bankruptcy within the meaning of the second paragraph of section 37. If not, he is "a person liable to pay" within section 38, or the trustee in bankruptcy is a "trustee" within the meaning of section 39, and the creditor is a party interested in the property out of which the trustee is entitled to pay. He cited *Ex parte Fosbrook* (1), in which it was held that one of two assignees in bankruptcy, who, against the will of his colleagues, taxed the bill of the assignees' solicitors and reduced it by more than one sixth, was entitled to his costs. In *Spencer* v. *Hart* (2) it was held that an application under the Solicitors Act was the proper and only remedy of a *cestui que trust* as regards the trustee's solicitor.

* *Coram* Brett, M.R., Baggallay, L.J., and Fry, L.J.

(1) 5 Jur. 370; 10 Law J. Rep. Bankr. 23.

(2) 51 Law J. Rep. Chanc. 271.

F. C. Willis and *L. H. Rosenthal*, for the solicitors, were not called upon.

BRETT, M.R.—The appellant is not one of the parties mentioned in the Solicitors Act as entitled to make this application.

BAGGALLAY, L.J.—I am of the same opinion.

FRY, L.J.—The Registrar says that there is no such practice in the Bankruptcy Court, and I do not think that we ought to alter the practice.

Appeal dismissed.

Solicitors—E. Kimber, for appellant; Radcliffe, Cator & Martineau, and A. E. Rosenthal, for respondents.

[IN THE COURT OF APPEAL.]

1885. June 18. } THE QUEEN *v.* RAWLINS. THE QUEEN *v.* DIBBIN.*

Poor — Clerk to Highway Board — Clerk to School Board — Payment of Salary out of District Fund—27 & 28 Vict. c. 101. *s.* 32—33 *&* 34 *Vict. c.* 75—*Election of Clerk as Guardian—Disqualification—5 & 6 Vict. c.* 57. *s.* 14.

The clerk to a highway board or a school board, whose salary is paid out of a district or school board fund, which is fed by moneys which are contributed by several parishes in accordance with precepts issued under the provisions of the Highway Act, 1864 (27 *&* 28 *Vict. c.* 101), *or the Elementary Education Act,* 1870 (33 *&* 34 *Vict. c.* 75), *is not disqualified, under* 5 *&* 6 *Vict. c.* 57. *s.* 14, *as being a person receiving a fixed salary from the poor rates in any parish or union, from serving as a guardian in such parish or union.*

Appeal from a decision of the Queen's Bench Division.

The defendant Rawlins, who had been elected and had acted as a guardian of the poor of the parish of Wimborne Minster, in the Wimborne and Cranborne Union,

* *Coram* Brett, M.R., Baggallay, L.J., and Bowen, L.J.

was clerk to the Wimborne Highway District Board, which included several parishes in the union. He received a salary of 50*l.* a year, which it was alleged was charged to a highway fund contributed by and charged upon the several parishes within the highway district board in proportion to the rateable value of the property in each district as provided by section 32 of 27 & 28 Vict. c. 101. The overseers paid the highway rate out of a poor rate levied by them by virtue of precepts issued to them by the highway board under the provisions of section 33 of the above-mentioned Act. The salary in question was paid out of the district fund of the highway board and not out of the poor rate; and the highway board and the board of guardians were distinct and separate bodies.

The Queen's Bench Division (Mathew, J., and Day, J.), discharged a rule calling on Rawlins to shew cause why an information in the nature of a *quo warranto* should not be exhibited against him to shew by what authority he claimed to exercise the office of a guardian of the poor of the parish of Wimborne Minster, being of opinion that the salary was not paid out of the poor rate within the meaning of 5 & 6 Vict. c. 57. s. 14, but out of moneys which in point of fact constituted a highway rate.

The relator appealed.

E. U. Bullen, for the appellant.—The salary is paid out of a fund which is raised by virtue of precepts issued to the overseers by the highway board under the provisions of 27 & 28 Vict. c. 101. ss. 32 and 33, and they pay the sum required out of a poor rate levied by them; the salary is therefore paid out of the poor rate. The defendant is therefore disqualified by section 14 of 5 & 6 Vict. c. 57 from being a guardian of the poor, inasmuch as he is a person receiving a fixed salary or emolument from the poor rates of a union for which he is serving as guardian. He also referred to 27 & 28 Vict. c. 101. s. 34, 38 & 39 Vict. c. 55. s. 216, and 41 & 42 Vict. c. 77. ss. 7 and 8.

Bosanquet, Q.C. (with him *C. C. M. Plumptre*), for the respondent.—The district fund out of which the salary is paid is formed of moneys raised by means of the precepts issued by the highway board under 27 & 28 Vict. c. 101. s. 33; and may consist partly of moneys which are from the poor rates and partly of moneys which are not. The fund when formed is for the expenses of maintaining the highways, and is therefore a highway rate and not a poor rate at all. It is a fund composed of mixed moneys, and the salary has not been paid out of the poor rates of a parish or union so as to disqualify the respondent, under 5 & 6 Vict. c. 57. s. 14, from serving as a guardian of the poor.

Bullen replied.

Brett, M.R.—The question is whether the defendant is a person receiving a fixed salary or emolument from the poor rates in any parish or union for which he has been made a guardian. If he does receive such a salary, he is not capable of being a guardian. It cannot be denied that he receives a fixed salary; and therefore the question arises, does he receive it from the poor rates. He is an officer of a highway board, and it seems to me that his salary as such is determined by section 32 of 27 & 28 Vict. c. 101, which is modified by section 7 of 41 & 42 Vict. c. 77. Even if the salary is paid under section 7 it would amount to the same thing, because it is an expense incurred by the board which is to be charged on the district fund. But, in my opinion, it is to be paid, under section 32 of 27 & 28 Vict. c. 101, out of a district fund, for it is to be annually charged to a district fund. It seems to me there is no difference in the expressions "charged to" and "charged on" the district fund. The salary is, by section 32, to be annually charged to a district fund, to be contributed by and charged upon the several highway parishes within the district. The fund is not charged upon an ordinary parish, although an ordinary parish may in some cases be conterminous with a highway parish, but is to be contributed by several highway parishes. Let us see whether there is more than one kind of highway parish. By section 33, the highway board is to order the precepts to be issued to the way-wardens or overseers. But where a highway parish is not a parish separately maintaining its

own poor, the precept of the highway board is to be addressed to the way-warden of the parish, who is to make a separate rate, which in some cases is to be levied in the same way as if it were a poor rate, and in others not. Then the section makes provision as to what is to be done with any surplus in his hands arising from any rate so levied above the amount for which the rate was made, so that one thing which is to contribute to the district fund is something which is not a poor rate at all, and which in some cases is called in this very section a highway rate. But where the precept is addressed to the overseers, the contribution to the district fund is from a poor rate to be levied by them, or from a part of the poor rate in their hands. It follows from this that the district fund is a fund made up of contributions from funds of different kinds. But directly it is in the hands of the highway board it is a fund of itself, and the moment it comes into existence is a fund different from any of the funds which have contributed to make it, and therefore it is not a poor rate. This officer, being paid out of a fund which is not a poor rate, is not, within section 14 of 5 & 6 Vict. c. 57, a person receiving a fixed salary or emolument from the poor rates in any parish or union; and therefore he is not incapacitated from being elected a guardian of the union for which he was elected. For these reasons I think that the judgment of the Court below was right.

BAGGALLAY, L.J.—I am of the same opinion. The question is whether the salary which the defendant Rawlins was entitled to as clerk to the highway district board was payable out of the poor rates of the parish or union in which he served as guardian. There have been various Acts of Parliament which modify the way in which the expenses of a highway board are to be borne. It is sufficient, however, to refer to section 32 of 27 & 28 Vict. c. 101, because, although section 7 of 41 & 42 Vict. c. 77 does modify the directions as to the property on which the assessment is to be made, it does not appear to me to affect the present question. Section 32 of 27 & 28 Vict. c. 101 provides that the salaries of the officers appointed for each district, and any other expenses incurred by any highway board for the common use or benefit of the several parishes within such district, are to be annually charged to a district fund, to be contributed by and charged upon the several highway parishes within such district in the proportions which were subsequently modified. Then we come to section 33, which is an important one, for the purpose of shewing how payment is to be obtained from the several highway parishes within the district of the sums to be contributed by them. The highway board is to order precepts to be issued by the way-wardens or overseers of the parishes in question, according to certain provisions contained in the Act, and which shall require the officer to whom the precept is addressed, within a time to be limited by the precept, to pay the sum therein mentioned to the treasurer of the board. It was admitted that the district fund would have to be raised by the overseers, so that it is not necessary to consider the provisions as to the case where the precept is addressed to a way-warden; but it is to be noticed that the district fund may be composed of funds raised both by the overseers and also by the way-wardens, and that in the latter case the fund can in no way be regarded as in the nature of poor rates. But where the precept is addressed to the overseers, they are to pay the sum required out of a poor rate to be levied by them, or out of any moneys in their hands applicable to the relief of the poor. I think the view taken by the Court below was quite right. The defendant's salary was not to be paid out of a fund which was the proceeds of a general poor rate in the hands of the overseers, but out of a fund which was separated from the poor rate and had been handed over to a different authority to be disposed of. The case, therefore, is not within the language of the prohibitory section of 5 & 6 Vict. c. 57, nor within the principle involved by the section—namely, that a man should not be in a position to vote the payment of money to himself.

BOWEN, L.J.—I am of the same opinion. The question is whether Rawlins is a person, within the language of 5 & 6

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Vict. c. 57. s. 14, who receives a fixed salary from the poor rates of the parish or union of which he is a guardian. He receives his salary from a fund which is fed partly by contributions in the nature of poor rates and partly by contributions which are not. It cannot, therefore, be said that he receives a fixed salary from the poor rates, and consequently he is not within the section.

Appeal dismissed (1).

Solicitors—Roberts & Barlow, agents for Bassett, Stanton & Co., Southampton, for appellant; Lovell, Son & Pitfield, for respondent.

[IN THE COURT OF APPEAL.]

1885. July 31. } SYKES *v.* SACERDOTI.*

Practice—Security for Costs—Party out of Jurisdiction—Actor on Counter-Claim—Cross-Action.

When a defendant out of the jurisdiction sets up a counter-claim which amounts to an independent action, and the plaintiff discontinues the action, the defendant may be ordered to give security for the costs of the counter-claim.

Appeal of the defendant from the decision of Grove, J., and Denman, J., ordering security for costs from the defendant residing out of the jurisdiction in an action on a solicitor's bill and for money paid. The defendant set up a counter-claim for damages for the negligence of the plaintiff as his solicitor, and leave was given him, upon an application under Order XIV. rule 1, to defend the action as to the money paid, summary judgment being ordered as to the claim on the solicitor's bill. The plaintiff afterwards discontinued what was left of his claim.

Cock, for the defendant.—A defendant out of the jurisdiction cannot be made to give security for costs. The plaintiff has brought him within the jurisdiction. In the Court of Chancery a party bringing a cross-action was not, if a foreigner, compelled to give security for costs—*McGregor* v. *Shaw* (1). He relied on *Mapleson* v. *Massini* (2), and distinguished *Winterfield* v. *Bradnum* (3) and *The Julia Fisher* (4).

C. W. Clifford, for the plaintiff, was not called upon to argue.

LORD ESHER, M.R.—As this case now stands, the real plaintiff in this action is the defendant, who is the actor in the counter-claim to which the plaintiff is the defendant. The counter-claim is an independent action. Whether when a counter-claim amounts to a cross-action, the actor, if out of the jurisdiction, ought to be compelled to give security, I decline to say now. We will deal with it when it arises, and with the case of *Mapleson* v. *Massini* (2). The present case is, in my opinion, identical in principle with *Winterfield* v. *Bradnum* (3). A counter-claim like this is simply another action tried for convenience with the plaintiff's action.

BAGGALLAY, L.J.—I agree.

Appeal dismissed.

Solicitors—J. W. Sykes, for plaintiff; Thomas & Hick, for defendant.

(1) The case of *The Queen* v. *Dibbin*, which raised a similar question as to the salary of the clerk to the School Board for the district, which was paid out of a rate raised by the overseers of poor under the provisions of 33 & 34 Vict. c. 75. s. 54, was not argued, the appeal being governed by the decision in the present case.

* *Coram* Lord Esher, M.R., and Baggallay, L.J.

(1) 2 De Gex & S. 360.
(2) 49 Law J. Rep. Q.B. 423; Law Rep 5 Q.B. D. 44.
(3) 47 Law J. Rep. Q.B. 270; Law Rep. 3 Q.B. D. 324.
(4) Law Rep. 2 P. D. 115.

[IN THE COURT OF APPEAL.]

1885. August 3, 5.

LOWE *v.* FOX.*

Lunatic—Private Asylum—Order for Reception — Statement of Particulars—Sufficiency of Answers—16 & 17 *Vict. c.* 96. *s.* 4—*Sched. A, form* 1—*Order of Discharge*—"*Forthwith*"—8 & 9 *Vict. c.* 100. *s.* 72—*Statute of Limitations—Married Woman—Tort committed during Coverture—Action brought subsequently*—8 & 9 *Vict. c.* 100. *s.* 105—21 *Jac.* 1. *c.* 16. *ss.* 3 *and* 7—*Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75).

The statement of particulars annexed to the order issued under 16 & 17 *Vict. c.* 96. *s.* 4, *and Sched. A. form* 1, *for the admission and detention of a patient in an asylum, forms part of such order; and such statement, if substantially accurate, will be in compliance with the Act.*

Where an order for the discharge of a patient has been given under 8 & 9 *Vict. c.* 100. *s.* 72, *by the person who signed the order for the reception of such patient, the proprietor of the asylum is bound to discharge the patient "forthwith"—that is, as soon as practically possible under the circumstances.*

The effect of the Married Women's Property Act, 1882, *is to make a married woman discovert from the date of the passing of that Act in respect of torts committed against her during coverture, and she is entitled to bring an action in respect of a tort committed during coverture and before* 1882, *which would otherwise be barred by* 21 *Jac.* 1. *c.* 16. *s.* 3; *for that statute begins to run only from the date of the passing of the Act of* 1882.

Appeal from a decision of the Divisional Court.

Action to recover 1,000*l.* damages for assault and imprisonment. The writ of summons was issued the 6th of May, 1884. The plaintiff was the wife of the Rev. G. Lowe, and sued in her own name. The defendant was a salaried superintendent of Brislington House, near Bristol, kept by the defendant's father and licensed for the reception of lunatic patients. The plaintiff was detained in the asylum from the 27th of September, 1870, to the 4th of February, 1871, under an order dated the 23rd of September, 1870, which had been signed by her husband, and the usual medical certificates. It was admitted by the plaintiff that the order and certificates were in all respects regular, but objection was taken by her with respect to the statement of particulars given by her husband. To one of the questions in the statement—namely, "Whether first attack?"—the husband had answered, "For the last twenty years has suffered from hysteria"; and to the question "When and where previously under care and treatment?" he had replied, "During those twenty years has been constantly under treatment." These answers were sent to the Lunacy Commissioners, but subsequently the husband added to the latter statement the words "for hysteria," and the statement so amended was never submitted to the commissioners.

On the 20th of January, 1871, the plaintiff's husband received a letter from the commissioners in which they declined to sanction her transfer from Brislington House to any other charge, and suggested that the plaintiff should be discharged. On the same day the plaintiff's husband forwarded the commissioners' letter to the defendant, and at the same time wrote: "After the commissioners' letter I suppose that I must consent to Mrs. Lowe's discharge, and beg you will carry out their suggestion as soon as you may think advisable . . . ."

The plaintiff was not discharged from the asylum until the 4th of February, 1871.

The defendant, in his statement of defence, denied that he maliciously and without reasonable and probable cause assaulted and imprisoned the plaintiff; alleged that he was only a salaried medical officer and superintendent at the asylum, of which his father was the sole proprietor; justified the detention of the plaintiff under the above-mentioned order and medical certificates, and relied also upon the provisions of 8 & 9 Vict. c. 100. ss. 99 and 105, and 21 Jac. 1. c. 16. s. 3.

The action was tried at the Somerset Winter Assizes, 1885, before Pollock, B., and a special jury, when the learned Judge

* *Coram* Lord Esher, M.R., and Bowen, L.J.

after hearing the plaintiff's evidence, held that the order dated the 23rd of September, 1870, was a proper order within the meaning of 8 & 9 Vict. c. 100. s. 99; that the letter written by the plaintiff's husband to the defendant did not amount to an order to discharge the plaintiff within section 72 of the same Act; that the acts complained of were done by the defendant in pursuance of the statutes 8 & 9 Vict. c. 100 and 16 & 17 Vict. c. 96; that there was no evidence to go to the jury that the defendant had acted maliciously; and that the plaintiff's action was barred by 8 & 9 Vict. c. 100. s. 105.

The learned Judge directed the jury to find a verdict for the defendant, and judgment was accordingly entered.

The Divisional Court (Grove, J., and Denman, J.) directed the verdict and judgment to be set aside, and ordered a new trial.

The defendant appealed.

E. Clarke, Q.C., and *R. O. B. Lane*, for the defendant.—It is contended by the plaintiff that the order signed by her husband is bad on the ground that the answers to two questions in the statement of particulars are insufficient. If the answers given are substantially accurate, the provisions of 16 & 17 Vict. c. 97 are complied with—*In re Shuttleworth* (1) and *The Queen* v. *Pinder; in re Greenwood* (2). The statement of particulars is under the Act to be part of the order. The term "care and treatment" means care and treatment in the technical sense in which it is used in the Act. Inasmuch as the plaintiff never had been under care it was not necessary to answer the question when and where. Both section 105 of 8 & 9 Vict. c. 100, and section 3 of 21 Jac. 1. c. 16, which have been pleaded, are a bar to the present action. The plaintiff was discharged from the asylum in 1871, and did not bring her action until 1884. More than four years have elapsed since the cause of action, if any, arose under section 3 of 21 Jac. 1. c. 16; and more than twelve calendar months under section 105 of 8 & 9 Vict. c. 100, since the act was done of which the plaintiff complains. The act of the defendant was done in pursuance of the statutes and under an order which was good. In *Weldon* v. *Neal* (3) it was held that the Statute of Limitations begins to run only from the date when the coverture was removed, which here would be in 1882, under the Married Women's Property Act, 1882. But the plaintiff could have sued alone when she was discharged in 1871, and the non-joinder of her husband would only have been subject to a plea in abatement. 8 & 9 Vict. c. 100. ss. 45 and 99; 16 & 17 Vict. c. 96. s. 2, and Sched. A. form 1, were also referred to.

The plaintiff in person.—The statement of particulars is an integral part of the order under 16 & 17 Vict. c. 96. s. 4. The question is whether the proper inference to be drawn from the statement is that this was the first attack of insanity. Under the statute a clear and categorical answer must be given. Then the letter written by the plaintiff's husband amounts to an absolute order for her discharge.

Clarke, Q.C., in reply.—The letter is not an order to discharge the plaintiff forthwith within the meaning of section 72 of 8 & 9 Vict. c. 100. It gave the defendant the option of deciding what was the proper time when she should be released.

The following judgments were delivered on August 5 :—

Lord Esher, M.R.—The first point, which, in the view we take, is not so material, is that the plaintiff brought her action too late. It was said on behalf of the defendant that she might have brought her action without joining her husband, subject to a plea in abatement. But in my opinion she could not have sued alone before the passing of the Married Women's Property Act, 1882; the action was therefore brought in time.

The next question is whether the order which was signed by her husband was in due form under the statute. It was said on the one hand that the order was one thing and the statement of particulars another, and that if the order was right

(1) 9 Q.B. Rep. 651; 16 Law J. Rep. M.C. 18.
(2) 24 Law J. Rep. Q.B. 148, 152.
(3) 32 W.R. 828.

the accuracy of the statement of particulars was not material. I am of opinion that the statement is part of the order, and it must therefore be accurate as well as the order. The question, therefore, is, Is the statement of particulars in conformity with the statute?—that is, are the particulars which have been given sufficiently or substantially accurate and such that no ordinary person could mistake what they meant? The difficulty in the statement of particulars was raised by the over-scrupulous endeavours of the plaintiff's husband to be quite accurate. Now, is it substantially in conformity with the statute? The first question was, "Whether first attack?" One answer might be "no," and another "yes," but the answer given is "For the last twenty years has suffered from hysteria." Now that answer must be read together with the answer to the further question as to "when and where previously under care and treatment?"—namely, "During those twenty years has been constantly under treatment."

The answers read together amount to this—that it is the first attack of insanity, although for the last twenty years the plaintiff has been subject to what is termed hysteria. If the answer to the first question had been "no, it is not the first attack," then it would have been necessary to answer the further question as to when and where under care and treatment. But in the present case the question what would be the proper answer to the question as to the care and treatment becomes immaterial. The statement of particulars was substantially correct, and the order was therefore right.

Then it was argued by the plaintiff that the letter written to the defendant by the husband was an order of discharge within the meaning of 8 & 9 Vict. c. 100. s. 72, which says that upon receipt of such an order the proprietor of an asylum shall discharge the patient "forthwith," and that if he did not do so then the patient would have a right of action against him. That contention, if the letter amounted to an order for the release of the plaintiff, is good. For, a proper order for the release of the plaintiff being given, the proprietor has no discretion, but would be bound to release her "forthwith" and against her will—not cruelly, as for instance if it were raining heavily, but within such a time as a reasonable man would say was practicable—that is, as soon after as was practicable. I think, however, the husband flinched from taking the responsibility of ordering her discharge, and tried to throw it upon the asylum-keeper. I do not think the letter amounted to such an order; it was nothing more than a request to the defendant to consider whether it was advisable to comply with the suggestion of the commissioners that she should be released. The plaintiff has no cause of action in respect of the original confinement or for the detention. The direction of Mr. Baron Pollock was therefore right, and the decision of the Divisional Court must be reversed.

BOWEN, L.J.—I should not have added anything if we had not been overruling the decision of the learned Judges in the Court below. The first point is that the plaintiff has brought her action too late. Now section 3 of 21 Jac. 1. c. 16 limits the time within which an action of assault or imprisonment can be brought to four years next after the cause of action has arisen. But section 7 makes an exception in the case of persons under coverture or the other disabilities there mentioned, and in the case of a married woman the time limited begins to run from the time when she becomes discovert—that is, she has four years from the date of discoverture within which to bring the action. But the plaintiff here has not become discovert, and has, if anything, brought her action too early. A married woman becomes discovert under section 7, and for the purposes of this section only, as soon as the Married Women's Property Act, 1882, was passed. The period of four years not having elapsed since the passing of that Act, the plaintiff has brought her action in time. The real point here is whether the statement of particulars annexed to the order received by the defendant is one which fulfils the statutory requirements. I think the statement becomes attached to the order by the words of section 4 of 16 & 17 Vict. c. 96, which provides that no person shall be received into any licensed house without

an order under the hand of some person according to the form given in Schedule A, No. 1, annexed to the Act, together with such a statement of particulars as is contained in the same schedule, or without medical certificates. There are two separate and distinct documents — the order and the medical certificates. The reason why the statement is not made a third document is that it is part of the order. Moreover, the order and statement of particulars is treated as one document in the sections which make certain offences in connection therewith misdemeanours. The giving a statement of particulars in due form is a condition precedent to the reception of a patient into an asylum. It must be accurate, truthful, and unambiguous, and such that a reasonable person can understand it. The order has reference to a person of unsound mind. I agree with the Master of the Rolls that the difficulty in the first instance was caused by the over-anxiety of the husband to state everything. This is apparent also from the answer given to the question "whether suicidal," in which he says that during the period when she was suffering from what is termed hysteria, the plaintiff took large doses of laudanum, but not with any intention, as he believed, of destroying her life. The question "Whether first attack?" is practically answered thus —"Yes; but I think it right to mention that she has been subject to hysteria." The expression "care and treatment" has a special medical meaning, and includes what one would expend upon a person of unsound mind. "Treatment" is applicable to the body, and "care" to the mind. The plaintiff has never been under "care," but she has been under "treatment." The questions were therefore sufficiently answered. The next point raised is as to the order of release. Section 72 of 8 & 9 Vict. c. 100 enables the person who signed the order on which the patient was received into the asylum to give an order for his discharge, and he would have a grievance if detained. But "forthwith" means at a time which is reasonably immediate under the circumstances. The letter written by the plaintiff's husband was a direction that the defendant, the responsible person at the asylum, should carry out the suggestion of the commissioners as soon as he should think it advisable to do so. Supposing the plaintiff had been suffering from an acute attack of dementia, the order would have left it for the defendant to decide when he should release her, and would take effect as soon as the defendant thought fit to do so. The decision of the Divisional Court must be reversed.

Appeal allowed.

Solicitors—Thos. White & Sons, for plaintiff; Mead & Daubeny, agents for Fox & Whittuck, Bristol, for defendant.

[IN THE COURT OF APPEAL.]

1885. June 25.

BARLOW *v.* TEAL.*

Landlord and Tenant—Yearly Tenancy —Agreement for Six Months' Notice to Quit —Agricultural Holdings Act, 1883 (46 & 47 *Vict. c.* 61), *s.* 33.

A yearly tenancy where the parties have expressly agreed for a six months' notice to quit is not within the Agricultural Holdings Act, 1883, *s.* 33, *which enacts that, "where a half-year's notice expiring with a year of tenancy is by law necessary and sufficient for determination of a tenancy from year to year, a year's notice so expiring shall by virtue of this Act be necessary and sufficient for the same."*

Decision of Divisional Court (*reported ante*, p. 400) *affirmed.*

Appeal from a decision of the Divisional Court (reported *ante*, p. 400).

The action was by a landlord against his tenant to recover possession of a farm. The tenancy was under a written agreement "for one whole year from the 6th of April, and so on from year to year until six months' notice shall have been given by one of the parties to the other in the usual way to determine the tenancy." The

* *Coram* Brett, M.R., Baggallay, L.J., and Bowen, L.J.

tenant had received notice on the 22nd of August to quit on the following Lady Day, but claimed to be entitled to a year's notice expiring with the year of tenancy, under section 33 of the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61).

The Divisional Court (Lord Coleridge, C.J., and Field, J.) affirmed an order made by the Master and a learned Judge at chambers giving the plaintiff leave to sign final judgment for possession of the land described in the indorsement on the writ.

The defendant appealed.

Cyril Dodd, for the defendant.—The notice given was not sufficient to determine the tenancy. The defendant is entitled under the Agricultural Holdings Act, 1883, s. 33, to a year's notice. Apart from the Act the defendant is entitled to a half-year's notice. The words of the agreement, "six months' notice in the usual way," mean a customary six months' or six calendar months' notice, and this is equivalent to a half year's notice. It is admitted that if the words mean six lunar months' notice, then the contention on behalf of the defendant cannot be supported—*Rogers* v. *The Kingston-upon-Hull Dock Company* (1). The Act, moreover, applies unless the parties have agreed in writing that it shall not do so. Here there is no express agreement that it shall not. *Wilkinson* v. *Calvert* (2) is distinguishable, being a decision upon the words of an Act which are different from those in the Act of 1883. *Doe d. Shore* v. *Porter* (3) is merely an authority as to the time when the notice to quit must determine, and not as to any difference existing between six months and half a year. The question is one as to which evidence might have been called, and therefore no order should have been made upon the application for judgment under Order XIV. *Right d. Flower* v. *Darby* (4), *Morgan* v. *Davies* (5), *Lang* v. *Gale* (6), *Hart* v. *Middleton* (7), *Hipwell* v. *Knight* (8), and *Cole on Ejectment*, p. 48, were also cited.

W. B. Prosser (with him *Douglas Kingsford*), for the plaintiff.—The Act of 1883 does not apply where the parties have under the contract purported to deal with the subject of the notice to be given to determine the tenancy. *Wilkinson* v. *Calvert* (2) is an authority that six months' notice is not half a year's notice. The words "by law" in section 33 mean "by implication of law," where the parties have not dealt in their contract with the question of notice. Moreover, the words "by law necessary and sufficient for determination of a contract from year to year" are not apt words to describe the rights of parties which arise out of contract; the section applies only to contracts which make no provision as to the notice. Here the parties have expressly stipulated for a six months' notice to be given in the usual way. The word "months" in the contract *prima facie* means lunar months—*Simpson* v. *Margitson* (9), *The Queen* v. *The Inhabitants of Chawton* (10), and *Lacon* v. *Hooper* (11).

BRETT, M.R.—It is not necessary in the present case to do more than construe the two words "by law," contained in section 33. I am of opinion, upon the true construction of the section, upon which it is necessary to put some meaning, that it applies where a lease, whether in writing or not, has no express stipulation between the parties with regard to the notice to be given in order to determine the tenancy. But where the parties have come to a contractual agreement as to the notice, then such notice must be determined by contract and not "by law." In the case of a tenancy from year to year, which arises from the fact of the tenant holding over or under an agreement which is not carried out, and wherever a tenancy from year to year arises by implication of law, it is a further implication of law that half a year's notice must be given, but that

(1) 34 Law J. Rep. Chanc. 165.
(2) 47 Law J. Rep. C.P. 679; Law Rep. 3 C.P. D. 360.
(3) 3 Term Rep. 13.
(4) 1 Term Rep. 159.
(5) Law Rep. 3 C.P. D. 260.
(6) 1 M. & S. 111.
(7) 2 Car. & K. 9.
(8) 1 You. & C. 401, 409.
(9) 11 Q.B. Rep. 23; 17 Law J. Rep. Q.B. 81.
(10) 1 Q.B. Rep. 247; 10 Law J. Rep. M.C. 55.
(11) 6 Term Rep. 224.

must be where the notice expires with the year by reason of law—that is, by law. So also where there is a written contract which constitutes a tenancy from year to year, but is silent as to the notice required to determine the tenancy, then by implication of law the notice must end with the year of the tenancy. But where the parties have agreed that the tenancy is to determine upon a certain notice, then such determination will not arise "by law," but by reason of contract. The antithesis to the words "by law" in this section is "by contract." The tenancy in that case is not determined by law, but by contract, and consequently is not within section 33. It therefore follows that the parties can, by specific agreement, take the case out of the Act; and even after a tenancy has been created they can agree that the section shall not apply. Here there was an express contract between the parties with regard to the notice to be given, and therefore the Act does not apply. It is not necessary on this occasion to construe the contract. The appeal must be dismissed.

BAGGALLAY, L.J.—I am of the same opinion. The section is to come into operation in the case of a tenancy created either before or after the commencement of the Act. Where a half-year's notice, expiring with a year of tenancy, is by law necessary and sufficient to determine a tenancy from year to year, and the landlord and tenant in writing agree that the section shall not apply, then a half-year's notice is to continue to be sufficient. Now what is a half-year's notice? It is one which arises by implication of law in a case where no contract has been made between the parties as to the notice to be given. The words "by law" are used to draw a distinction between the cases where there is a notice agreed upon sufficient to determine the tenancy and where there is none. I think the view taken by Lord Coleridge in *Wilkinson* v. *Calvert* (2), so far as the circumstances of that case are concerned, is based upon the distinction which has been pointed out in the present case. The other cases cited do not appear to throw any light upon the matter, but depend upon the question whether the notice is to be calculated from feast-day to feast-day, or whether the word "months" means lunar or calendar months.

BOWEN, L.J.—I am of the same opinion. Section 33 applies only to cases where half a year's notice is "by law" necessary and sufficient to determine the tenancy from year to year. Such a notice is by law necessary and sufficient only in cases where the parties have not otherwise made provision as to the notice. If they have made such provision, then the notice does not depend upon any implication of law, but upon a special contract. The section, where there is no express agreement between the parties, really converts the ordinary half a year's notice into a year's notice.

Appeal dismissed.

Solicitors—Bowlings, Foyer & Hordern, for plaintiff; Pitman & Sons, agents for Thomas Sykes, Harrogate, for defendant.

[IN THE COURT OF APPEAL.]

1885. Feb. 27. } *Ex parte* MILES; *in re* ISAACS.*

Stoppage in transitu—Destination—Commission Agent—Goods ordered to Port for Shipment Abroad—Bankruptcy of Commission Agent.

Where a commission agent ordered goods, bought by him of a firm at Northampton in pursuance of instructions from his principals in Jamaica, to be sent to shipping agents at Southampton for shipment by a steamer named, with marks on the cases shewing that they were going to Jamaica as in previous transactions, it was held that the destination of the goods was Southampton, so that the vendors, on the commission agent becoming insolvent, had no right of stoppage in transitu upon the goods arriving in Jamaica.

Appeal of the trustee from the order of Mr. Registrar Brougham ordering the proceeds of goods to be paid to Turner & Co.

* *Coram* Brett, M.R., Baggallay, L.J., and Lindley, L.J.

Ex parte Miles; in re Isaacs, App.

The bankrupt, who traded as Elkin & Co. in London, was employed by Morrice & Co., of Kingston, Jamaica, to buy boots and shoes for them, as commission agent, from Turner & Co.

On the 3rd of July, 1883, the bankrupt wrote to Turner & Co., of Northampton, two orders for boots for the mark "E. M., Kingston, Jamaica," to be paid for by six months bills on the bankrupt.

On the 11th of September the bankrupt instructed Turner & Co. to forward the boots so ordered in numbered packages, bearing the mark, to Dunlop & Co., Southampton, for shipment per *Moselle*, and to advise Dunlop & Co. with particulars for clearance. Turner & Co. accordingly forwarded the goods, instructing Dunlop & Co. to "forward them as directed," and giving them the particulars with destination and consignee in blank, and paid the carriage to Southampton. They also sent the invoices to the bankrupt, who instructed Dunlop & Co. that the consignees were Morrice & Co. and the destination Jamaica. The goods were shipped, the bankrupt being described on the bills of lading as consignor and Morrice & Co. consignees. While the ship was on the sea Turner & Co. heard that the bankrupt had suspended payment, and, as they knew from previous dealings that goods so marked would go to Morrice & Co. in Jamaica, had the goods stopped at Kingston. The goods, on the adjudication, were sold and the proceeds deposited to abide the decision.

Aspland, for the trustee.—The vendors had no right to stop the goods *in transitu*, because the transit as between them and the bankrupt, the purchaser from them, was at an end at Southampton. The vendors happened to know that the goods were going to Jamaica after leaving Southampton, but that was no part of their transaction with the bankrupt, and was purely accidental. He cited *Dixon* v. *Baldwen* (1), *Valpy* v. *Gibson* (2), and *Kendal* v. *Marshall* (3). As to the bankrupt being a principal as between him and Turner & Co., he cited *Ireland* v. *Livingston* (4) and *Elbinger Actien Gesellschaft* v. *Claye* (5).

S. Woolf, for Turner & Co.—Both parties contemplated Jamaica as the terminus. There was in effect an instruction by the bankrupt to Turner & Co. to forward the goods to Dunlop & Co. for shipment to Jamaica. No fresh destination was given to the goods by the bankrupt. The payment of the carriage by Turner & Co. to Southampton only does not prevent this inference. He cited *In re Love; ex parte Watson* (6) as to knowledge of the destination, and *Ex parte Rosevear China Clay Company* (7) and *Rodger* v. *Comptoir d'Escompte de Paris* (8).

BRETT, M.R.—The question in these cases is on which side of a very fine line the facts fall. The meaning of the relation between Morrice & Co. and the bankrupt as a commission agent was that the bankrupt was to buy goods as principal from Turner & Co. and sell them again as principal to Morrice & Co., but that the bankrupt undertook to sell them again at the same price as he gave for them *plus* an agreed commission. The relation between Turner & Co. and the bankrupt was that of vendor and purchaser. The instructions from Morrice & Co. to the bankrupt were not to buy boots from any one but from Turner & Co. The business interpretation of the mark to be placed on the goods is not that Turner & Co. were to forward them to Jamaica, but by the letter of the 11th of September the bankrupt orders them to be sent to "Dunlop & Co., Southampton, for shipment per *Moselle*, advising them with particulars for clearance." Is this an order to forward the goods to their destination in Jamaica? Sending them to their destination means, in my opinion, sending them to a particular place to a

(1) 5 East, 175.
(2) 4 Com. B. Rep. 837; 16 Law J. Rep. C.P. 241.
(3) 52 Law J. Rep. Q.B. 313; Law Rep. 11 Q.B. D. 356.
(4) 41 Law J. Rep. Q.B. 201; Law Rep. 5 H.L. 395.
(5) 42 Law J. Rep. Q.B. 151; Law Rep. 8 Q.B. 313.
(6) 46 Law J. Rep. Bankr. 97; Law Rep. 5 Ch. D. 35.
(7) 48 Law J. Rep. Bankr. 100; Law Rep. 11 Ch. D. 560.
(8) 38 Law J. Rep. P.C. 30; Law Rep. 2 P.C. 393.

Ex parte Miles; in re Isaacs, App.

particular person, and not sending them to a particular place without saying to whom. Turner & Co. took this view of the transaction, because they left blank the columns for destination and consignee in the particulars which they forwarded.

Upon these facts I think the case comes within *Dixon* v. *Baldwen* (1). In the words of Lord Ellenborough in that case —"The goods had so far gotten to the end of their journey that they waited for new orders from the purchaser to put them again in motion and communicate to them another substantive destination, and that without orders they would continue stationary." That seems to me to be the upshot of what was done from the business point of view.

The case seems to me also to come within *Valpy* v. *Gibson* (2), or at all events within the *dictum* of Chief Justice Wilde when he said—"Though the defendants knew the goods were to be sent to Valparaiso, and so informed Leech, Harrison & Co. when they forwarded them to Liverpool, yet Leech, Harrison & Co. could not, simply on that information, forward the goods to Valparaiso, but they held them subject to such orders as Brown might give as to forwarding them to Valparaiso or elsewhere, and the *transitus* was consequently at an end as soon as the goods came to the hands of Leech, Harrison & Co." Upon mercantile law a *dictum* of Chief Justice Wilde is a strong authority, and this passage has always been so considered.

I do not think that *In re Love; ex parte Watson* (6) is to the contrary. That decision is, I think, founded on the assumption that the purchaser directed the vendor to send the goods straight from the place of manufacture to Shanghae. This is not like the present case. It is on the other side of the line; but this case is on the same side of the line as *Dixon* v. *Baldwen* (1). I think, therefore, that the decision of the Registrar must be overruled.

BAGGALLAY, L.J., concurred.

LINDLEY, L.J., concurred.—The principle to be applied was well laid down in *Kendal* v. *Marshall* (3). There was not, as in *In re Love; ex parte Watson* (6), a bargain that the goods should go straight to Jamaica. In that case the seller could have obtained an injunction to restrain the goods from going anywhere else, but in the present case the sellers could not have prevented the buyer from sending the goods where he pleased after Southampton.

Appeal allowed. Leave to appeal to the House of Lords refused on the ground that a question of fact only was involved.

Solicitors—Spyer & Son, for trustee; C. A. Bannister, for respondents.

1885. June 19. LONDON AND YORKSHIRE BANKING COMPANY *v.* BELTON, ROSS, AND OTHERS (*claimants*).

Landlord and Tenant — Distress for Rent—Liability of agisted Stock to Distress—46 & 47 *Vict. c.* 61 (*Agricultural Holdings Act*, 1883), *s.* 45—"*Fair price.*"

By section 45 *of the Agricultural Holdings Act*, 1883 (46 & 47 *Vict. c.* 61), *a limitation is imposed on a landlord's right to distrain for rent in respect of live stock agisted on the demised premises, and if such stock has been taken in by the tenant to be fed at a fair price agreed to be paid by the owner, and it is distrained, there shall not be recovered by such distress a sum exceeding the amount of the price so agreed to be paid for the feeding; . . . and if part of such price has been bona fide paid to the tenant under the agreement, then the distress can only be to the full extent of the price remaining unpaid.*

Stock having been agisted under a bona fide agreement on fair terms, not involving the payment of money,—Held, *that fair "price" meant "equivalent," and not necessarily money, and that the stock was protected under such agreement by virtue of the section.*

This was an appeal from the County Court Judge of Nottinghamshire on his decision upon an interpleader issue. Two

cows belonging to one Smith were seized in a distress for rent by the landlord of the farm upon which they were being agisted. The agreement for agistment between Smith and the tenant of the farm was a *bona fide* and fair agreement, and was to the effect that the tenant should have the milk of the cows as the equivalent for finding them pasture for a certain time. The landlord claimed the right to seize and sell the cows under the distress, notwithstanding the Agricultural Holdings Act, 1883, s. 45, on the ground that the protection afforded by that section extended only to cases where the cattle were being agisted under an agreement for the payment of a fair price in money by the owner to the tenant.

The County Court Judge held that the section applied where the payment for agistment was agreed to be made otherwise than in money.

Joseph Tanner shewed cause, on behalf of the owner of the cows, against the rule obtained to set aside this judgment.—"Price" is not necessarily money. It is enough if the defence of payment could be pleaded, as it could here, if the owner were sued by the tenant. "Payment in cash" in the Companies Act, 1867, s. 25, has been held to be satisfied by a *bona fide* transaction not involving actual money payment—*Spargo's Case* (1) and *White's Case* (2). It is submitted that the absence of an agreement to pay in money does not prevent the section, which, in principle, is applicable, from applying.

C. Dodd, contra.—The rights of landlords are, by section 60, saved, except where expressly taken away; so section 45 must be construed strictly. "Price" ordinarily means money, and other words in the section shew that it is so limited here. How otherwise is a "sum not exceeding the amount of the price" to be calculated—or "sum equal to the price"? The Act gives the landlord the value of the agistment contract, and its intention was to avoid all complications, and deal with money payments only.

LORD COLERIDGE, C.J.—This case has been ingeniously argued, and the question arising upon the construction of an Act of Parliament is one upon which I give the best opinion I can form, being at the same time willing that if it be thought fit the matter may be further discussed in the Court of Appeal. I think that the County Court Judge was right. The simple question is whether the "fair price" in section 45 of the Agricultural Holdings Act, 1883, "agreed to be paid" for agistment of stock is really to include agreements for barter as well as for payment in cash. The County Court Judge has found—and I see no difficulty in accepting his finding—that such agreements are very common in the county where he is; and, if this be true as to large portions of the country, it is observable that the provisions of the Act would be narrowed considerably were we to decide contrary to his judgment upon the meaning of the words: for where no question of *bona fides* arose, the Act would nevertheless fail to give relief. Now, what does "price" mean? In ordinary colloquial language "price" does not always mean "money," and "fair price" is not necessarily an adequate sum of current coin: it may be used where the result of a transaction is that a man gave a fair equivalent for what he got. Now here the Act says, if the person have made a fair bargain as to his cattle being agisted, certain consequences follow. He is not to have his cattle taken from him by the landlord, except to the extent to which he has agreed to give the fair price, or equivalent, so long as and so far as it remains unpaid. So in construing this Act, as the matter must have been known to the Legislature, I think that we should give the widest effect to the statute: I think that, reasonably construed, the words mean what the County Court Judge has held.

There are, no doubt, words and expressions in favour of Mr. Dodd's contention that "price" means money and nothing else; but they are not conclusive; and for the reasons I have given I think this rule must be discharged.

(1) 42 Law J. Rep. Chanc. 488; Law Rep. 8 Ch. App. 407.

(2) 48 Law J. Rep. Chanc. 820; Law Rep. 12 Ch. D. 511.

London &c. Banking Co. v. *Belton.*

MATHEW, J.—I am of the same opinion. I cannot gather from the section itself the slightest evidence of the intention of the Legislature being that the contract must be for money only; and I should hesitate to say, that if a small part of an agistment agreement was a barter, and the rest was money, the section would not apply to the whole.

I think that "fair price" means equivalent, the object being to prevent collusion between the tenant and the owner of cattle agisted, and this is perfectly secured by the interpretation of the section given by the County Court Judge, and which I think we should uphold. I agree that the decision may be the subject of further appeal, if thought fit.

Rule discharged.

Solicitors—A. F. & R. W. Tweedie, agents for Shirley & Blackburne, Doncaster, for landlord; Finnis & Wylie, agents for Verity & Baddiley, Thorne, for claimant.

[IN THE COURT OF APPEAL.]

1885. May 9, 12. THE GUARDIANS OF THE HOLBORN UNION *v.* THE GUARDIANS OF THE CHERTSEY UNION.

Practice—Court of Appeal—Case stated—Baines's Act (12 & 13 *Vict. c.* 45), *s.* 11—*Right to appeal without Leave—Judicature Act*, 1873, *s.* 19—*Poor Law—Removal—Settlement of Children.*

[For the report of the above case, see 54 Law J. Rep. M.C. 137.]

BANKRUPTCY. 1885. August 4, 11. *In re* RIDGWAY; *ex parte* RIDGWAY.

Gift of Chattels—Retention of Possession by Donor.

In order to make an effectual gift of chattels there must be an immediate present gift of the chattels, and not merely an expression of intention to make a future gift.

Per CAVE, J.—*Retention of possession by the donor of a chattel is not conclusive proof that there is no immediate present gift by him of the chattel.*

This was a motion on behalf of Tom Ridgway, an infant, by his next friend, for an order restraining the trustee in bankruptcy of Colonel Ridgway from selling certain port wine, and that the wine should be delivered by the trustee to the applicant.

There was a similar motion on behalf of Alice Ridgway.

The applicants were the children of the bankrupt, and resided with him at Sheplegh Court, his private residence. At the date of the bankruptcy, which occurred in 1885, the wine in question was in the cellars at Sheplegh Court, and was taken possession of by the trustee.

The facts and arguments sufficiently appear from the judgment.

Sidney Woolf, for the applicants, in support of the motions.

Herbert Reed, for the trustee, *contra*.

The following authorities in addition to the cases cited in the judgment were referred to—*Bourne* v. *Fosbrooke* (1); 2 *Man. & Gr. Rep.* 691, note (*a*); and *Kent's Commentaries*, vol. ii. s. 438.

Cur. adv. vult.

CAVE, J. (on August 11), delivered judgment.—This is a motion for an order restraining the trustee in bankruptcy from selling certain port wine.

There is a motion first on behalf of Alice Ridgway, and secondly on behalf of Tom Ridgway.

The wine in question is claimed by the

(1) 18 Com. B. Rep. N.S. 515; 34 Law J. Rep. C.P. 164.

applicants as a gift from their father, the bankrupt.

In order to make out such a gift as will entitle the applicants to succeed they must shew circumstances from which an intention of making an immediate present gift may reasonably be inferred. Circumstances from which an intention of making a future gift may reasonably be inferred will not be sufficient.

It is contended for the trustee that change of possession from the donor to the donee must be shewn, and that no property passes so long as the subject of the gift remains in the possession of the donor—*Irons* v. *Smallpiece* (2) and *Shower* v. *Pilck* (3). On the other hand, it is said that the principle laid down there goes too far, and has been disapproved of by Baron Parke in *Ward* v. *Audland* (4), by Mr. Justice Crompton in *Winter* v. *Winter* (5), and by Baron Pollock in *In re Harcourt* (6).

I am of opinion that it is going too far to say that retention of possession by the donor is conclusive proof that there is no immediate present gift, although undoubtedly, unless explained, or its effect destroyed by other circumstances, it is strong evidence against the existence of such an intention.

The applicants must, however, prove circumstances from which it can fairly be inferred that the donor intended to make an immediate gift, so that the thing given them ceased to be the donor's and became the property of the donees. It is not enough to prove circumstances from which the proper inference is that the donor intended to make a gift in the future, but so that until something future was done to complete the gift he should retain control over the thing intended to be given.

I may at once dispose of most of the affidavits. The reputation in the family and among the friends that it was Tom's or Alice's wine proves very little. Such a reputation would arise from the expression of his intention by the donor, whether it was an intention to give at once or at some future time.

As to Tom's wine: Eighteen or twenty years ago, soon after Tom's birth, Colonel Ridgway determined to lay down a pipe of port, and told the family and his friends it was for Tom. It was, however, placed in the colonel's cellar, and remained in his possession, and occasionally a bottle of it was tried to test its condition. The bulk has not been drunk, and is not yet ready to drink.

It is suggested that the wine became Tom's when it was first laid down—and indeed it is clear that unless there was a gift then, nothing has been done since to amount to one.

I think, however, that the circumstances point to an intention to give in the future, rather than to a present gift. The wine was useless to the child while he remained such, and he must at the time have been quite unconscious of any gift and quite incapable of exercising any acts of ownership. Was it intended that when the boy got to sixteen or seventeen he should be free to drink it at his pleasure, or to exchange it for a gun, for instance, or a horse? I cannot think that anything of the kind was intended. In my opinion Colonel Ridgway had formed the intention of giving it to his son at some future time without fixing in his own mind when that time should arrive, and had determined in the meantime to retain the control over it and the power of dealing with it as circumstances might require.

As to Alice's wine: Having expressed his intention of giving Tom a pipe of port, Colonel Ridgway seems to have thought it only fair to his eldest daughter that she also should have some wine, and he expressed his intention of giving her certain wine in his cellar which was then in particular bins. His original intention was, as he says, to give the wine to Alice and Jane jointly, but he only expressed the intention of giving the wine to Alice; and so, contrary to his real intention, the wine acquired among his family and friends the reputation of being Alice's, and not Alice's and Jane's. Beyond the expression of intention nothing was done to change the property. The wine remained in Colonel Ridgway's cellar and under his control;

(2) 2 B. & Ald. 551.
(3) 4 Exch. Rep. 478; *nom. Sharr* v. *Pilck*, 19 Law J. Rep. Exch. 113.
(4) 16 Mee. & W. 862, at p. 871.
(5) 4 Law Times, N.S. 639.
(6) 31 W.R. 578.

and though it was once moved, yet that was not done with any reference to the gift, but simply for the more convenient arranging of the wine in Colonel Ridgway's cellar. The wine is still immature, and only a small part of it has been consumed — consumed by Colonel Ridgway and his friends, for the young lady does not drink port. Here, again, if there was any present immediate gift, it was made when Colonel Ridgway expressed the intention of giving it, and when Alice was a child, for nothing has been done since in any way to carry out the intention or to complete the gift if it was then imperfect.

I feel myself compelled to come to the same conclusion in this case as in the case of Tom's pipe, and for the same reasons. If Alice had married I think Colonel Ridgway would have completed the gift by sending the wine to her; but I think that both his and her understanding of the so-called gift was that she was not, without some future consent on his part, to be at liberty to sell it or give it away, but that so long as she remained a member of his household the wine as it matured was to be consumed by the family in the ordinary way.

In my judgment there never was in either case any intention on the part of Colonel Ridgway of making a present immediate gift; and both applications must be refused, with costs.

Motion refused, with costs.

Solicitors—Parker, Garrett & Parker, for trustee; Anderson & Son, for applicant.

BANKRUPTCY. 1885. Aug. 4. } *In re* ANDREWS; *ex parte* THE DEBTOR.

Bankruptcy—Practice—Judgment Summons before Court not having Bankruptcy Jurisdiction—Transfer to Court having Bankruptcy Jurisdiction—Notice to Judgment Debtor of Application for Receiving Order—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 5—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 103, *sub-s.* 5—*Additional Bankruptcy Rules, 4th of March*, 1885, *rule* 268 (1) (*a*).

Where the Judge of a Court not having jurisdiction in bankruptcy, to whom an application to commit a judgment debtor is made under section 5 *of the Debtors Act*, 1869, *transfers the matter in pursuance of rule* 268 (1) (*a*) *of the Additional Bankruptcy Rules of the 4th of March*, 1885, *to a Court having jurisdiction in bankruptcy, the functions of the latter Court as to making a receiving order against the judgment debtor are judicial and not ministerial merely.*

Notice, therefore, should be given to the judgment debtor of the hearing by the Court to which the matter is transferred of the application for a receiving order.

This was a motion on behalf of the debtor to rescind a receiving order.

On the 13th of May, 1885, a judgment summons directed to the debtor in respect of a sum of 5*l.* 15*s.* was granted by the City of London Court under the Debtors Act, 1869, section 5, upon the application of Gosnell & Co., judgment creditors of the debtor.

The City of London Court is a County Court not having bankruptcy jurisdiction.

Upon the hearing of the judgment summons on the 20th of June, 1885, the Judge of the City of London Court, being of opinion that a receiving order should be made in lieu of committal, ordered that the judgment summons and all further proceedings be, pursuant to the Additional Bankruptcy Rules of the 4th of March, 1885, rule 268 (1) (*a*), transferred to the Division of the High Court having jurisdiction in bankruptcy (1).

(1) Rule 268 (1) (*a*) of the Additional Bankruptcy Rules of the 4th of March, 1885, provides

In re Andrews; ex parte the Debtor, Bankr.

The debtor was not present at the hearing on the 20th of June, 1885.

On the 16th of July, 1885, upon the application of the judgment creditors, and with their consent, a receiving order was made against the debtor by Smith, J.

No notice of this application for a receiving order was given to the debtor.

Herbert Reed, for the judgment debtor, in support of the motion, submitted that the receiving order should be set aside. Notice of the application for the receiving order should have been given to the debtor. The Court had to decide in every case whether it was a proper one for a receiving order, and therefore the debtor should be heard.

Sidney Woolf, for the judgment creditors, submitted that the effect of the Bankruptcy Act, 1883, section 103, sub-section 5, and the Additional Bankruptcy Rules of the 4th of March, 1885, rule 268 (1) (*a*), was to render the duty of the Court to which the proceedings were transferred ministerial merely. The Judge of the Court from which the proceedings were transferred was of opinion that a receiving order should be made, and this Court had merely to see that the requirements of the Bankruptcy Act, 1883, section 103, sub-section 5, were complied with. No notice to the debtor, therefore, was necessary.

CAVE, J., held that the action of the Court was judicial and not ministerial merely. The Court had a discretion to exercise as to whether the receiving order should be made. The proper course to be taken in cases where a transfer had taken place, as here, was that an appointment should be obtained to hear the application for a receiving order, and notice of the hearing should be given to the judgment debtor. The effect of the statute and the rules was to leave the judgment summons in these cases as if it was a summons transferred to the Court having jurisdiction in bankruptcy, and the Court upon such transfer had a discretion to exercise whether the receiving order should be made or not.

Receiving order set aside; judgment summons adjourned; costs reserved.

Solicitors—H. C. Knight, for debtor; S. M. & J. B. Benson, for judgment creditors.

as follows:—"Where an application to commit is made to the Judge of a Court not having bankruptcy jurisdiction, and he is of opinion that a receiving order should be made in lieu of committal, he may order the matter to be transferred to the Court to which under the provisions of the Act and Rules a bankruptcy petition against the debtor in relation to the amount of the judgment debt would at the date of the transfer be properly presented."

[IN THE COURT OF APPEAL.]

1885. July 31. *In re* BROAD AND BROAD.*

Costs—Third Counsel in Court of Appeal—Solicitor and Client—Sanction of Client—Failure of Solicitor to warn Client of probable Disallowance.

Where a solicitor retains a third counsel on the argument of an appeal with the client's sanction, but without warning him that the costs will probably be disallowed on taxation if he be successful, the solicitor cannot recover the counsel's fee.

Appeal of Messrs. Broad & Broad from the decision of Field, J., and Manisty, J., affirming the refusal of Lopes, J., at chambers to review taxation.

On a taxation of costs as between solicitors and client the Master disallowed the fee of a third counsel who had been retained by the solicitors upon the argument of an appeal in which the client was appellant, which fee had been disallowed as between party and party. The solicitors had informed the client of their intention of retaining a third counsel, and the client had assented; but the solicitors did not warn the client that he might, if successful, have to pay the costs himself.

Dunham, for the solicitors.—*In re Blyth and Fanshawe* (1) is distinguishable. The

* *Coram* Lord Esher, M.R., and Baggallay, L.J.

(1) 52 Law J. Rep. Q.B. 186; Law Rep. 10 Q.B. D. 207

In re Broad, App.

rule that shorthand notes will not be allowed as between party and party without a special direction is positive—*De la Warr* v. *Miles* (2). As to third counsel the Taxing Master has a discretion.

J. L. Walton, for the client, was not called upon.

LORD ESHER, M.R.—A more wholesome rule than that of *In re Blyth and Fanshawe* (1) I never heard. In that case Lord Justice Baggallay laid down that "if unusual expense is about to be incurred in the course of an action, it is the duty of the solicitor to inform his client fully on the subject, and to point out to him that the additional expense incurred may not be allowed to him in the eventual taxation, whatever may be the result of the trial." In that case the unusual expense was the cost of shorthand notes. In this case it is the cost of a third counsel in the Court of Appeal. Is that an unusual expense? Yes; it is contrary to the usual practice. It is not enough for the solicitor to tell the client that he proposes to retain a third counsel and to obtain his sanction, but he must tell the client the probable effect on the costs. I am by no means so sure that the client would give his sanction in such circumstances.

BAGGALLAY, L.J.—I am of the same opinion.

Appeal dismissed.

Solicitors—Broad & Broad, for solicitors; Sandom, Kersey & Knight, for client.

(2) 51 Law J. Rep. Chanc. 407; Law Rep. 19 Ch. D. 80.

[IN THE COURT OF APPEAL.]

1885. July 31. } *In re* DAWDY AND HARTCUP.*

Arbitration—Valuation—Rule of Court—"Agreement or Submission in Writing"—Common Law Procedure Act, 1854 (17 & 18 *Vict. c.* 125), *s.* 17.

Where, by a written agreement of demise between landlord and tenant, the tenant, at the expiration of the tenancy, is to be paid the usual and customary valuation, the persons making the valuation to take into consideration the state, condition, and usage of the lands, and, if not left in a proper state, to deduct compensation for the landlord, and thereupon two valuers, appointed by the landlord and the tenant, nominate an umpire who makes an award, the agreement is not an "agreement or submission to arbitration in writing" within section 17 *of the Common Law Procedure Act*, 1854, *and there is no foundation for a rule of Court.*

Appeal of Dawdy from the decision of the Lord Chief Justice and Mathew, J., affirming a refusal of Lopes, J., and the Master at chambers to make a submission and appointment of arbitrators a rule of Court.

By a written agreement dated the 4th of October, 1882, Hartcup agreed to let, and Dawdy to take, a farm in Suffolk for twelve years, determinable, nevertheless, at Michaelmas in any year by six months' written notice on either side. The agreement contained the following clause:—"The tenant shall be paid, at the expiration of the tenancy, the usual and customary valuation as between outgoing and incoming tenant, in the same manner as he paid upon entering the premises; and it is hereby mutually agreed and declared by and between the parties hereto that when any valuation of the covenants shall be made between the tenant and the landlord or his incoming tenant, the persons making such valuation shall take into consideration the state, condition, and usage of the said lands and premises, and, if not left in a proper and creditable state, shall determine what sum of money shall be paid

* *Coram* Lord Esher, M.R., and Baggallay, L.J.

to the landlord as compensation therefor, and shall deduct such sum from the amount of the said valuation."

On the 11th of October (old Michaelmas Day), 1884, the term expired by reason of notice duly given by Dawdy; and shortly before that date, in accordance with the custom of the county of Suffolk, two valuers were appointed by Dawdy and Hartcup respectively. The valuers could not agree, and they appointed an umpire. The umpire held a sitting or sittings at which the valuers and the parties attended, and witnesses were examined on both sides, and subsequently he made and published an award in writing, awarding 761*l.* 5*s.* 9*d.* to be paid by Hartcup to Dawdy. This award the umpire subsequently withdrew in favour of another award, in which the amount payable to Dawdy was corrected to 877*l.* 5*s.* 9*d.*, being 116*l.* in excess of the original amount. Thereupon Dawdy took out the summons, asking that the submission in the agreement of the 4th of October, 1882, might be made a rule of Court with the view of remitting the matter to the umpire for the correction of the first award.

By section 17 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), it is provided that "every agreement or submission to arbitration by consent, whether by deed or instrument in writing not under seal, may be made a rule of any one of the superior Courts of law or equity."

Candy, for Dawdy.—The words in the agreement, "usual and customary valuation," import the appointment of two valuers, and, in the event of a difference of opinion, an arbitrator or umpire, according to the usual and customary rules observed in the county. The concluding words of the clause support this view of its meaning, and the subsequent proceedings of the landlord and the tenant carry it out.

He cited *Turner* v. *Goulden* (1), *In re Willcox and Storkey* (2), *In re Hopper* (3), and *Bos* v. *Helsham* (4).

(1) 43 Law J. Rep. C.P. 60; Law Rep. 9 C.P. 57.

(2) Law Rep. 1 C.P. 671.

(3) 8 B. & S. 180; 36 Law J. Rep. Q.B. 97; Law Rep. 2 Q.B. 367.

(4) 36 Law J. Rep. Exch. 20; Law Rep. 2 Exch. 72.

M. Mackenzie, for Hartcup, was not called upon.

LORD ESHER, M.R.—The question is whether there is a submission in writing to arbitration which can be made a rule of Court under section 17. Mr. Candy, in his strenuous and able argument, admitted that there was no submission in writing unless it was by the agreement of the 4th of October, 1882. An arbitration is a proceeding conducted according to judicial rules, and the arbitrator hears the parties and their evidence. A valuation is a proceeding in which a person specially skilled in the subject-matter decides solely by the use of his eyes and his knowledge. The agreement says that there is to be the usual and customary valuation, which may be made by more than one person; but I can see nothing in the clause except that they are to be valuers and not arbitrators. The case therefore comes within *Collins* v. *Collins* (5) and *Bos* v. *Helsham* (4), and *In re Hopper* (3) is not inconsistent with them. In that case there was a distinct provision in the agreement that in case the parties should disagree in their valuation they should, before proceeding to value, name an umpire, whose decision should be binding. There is no such provision in this agreement, and we cannot insert such a provision unless it is a necessary implication. As to what happened after the agreement, the appointment of an arbitrator is not a submission; it is only a consequence of such submission. The decision of the Divisional Court was right.

BAGGALLAY, L.J., concurred.

Appeal dismissed.

Solicitors—Green & Hartcup, agents for Hartcup & Sons, Bungay, Suffolk, for Hartcup; Storey & Cowland, agents for Sadd & Co., Norwich, for Dawdy.

(5) 26 Beav. 306; 28 Law J. Rep. Chanc. 184.

1885. May 21. SANDERS v. DAVIS.

Fixtures—Mortgagor and Mortgagee—Tenancy created by Mortgagor after Mortgage—Claim of Tenant to Trade Fixtures.

A mortgagor remaining in possession of the mortgaged premises let them to a tenant who brought in trade fixtures:—Held, *that the tenant was entitled to remove the fixtures as against the mortgagee as well as against the mortgagor.*

This was an action brought for the value of certain fixtures which one Hunt, who afterwards assigned them to the plaintiff, had placed in a messuage of which the defendant was mortgagee, the facts appearing by Special Case to be as follows:—

On the 1st of May, 1878, by indenture of mortgage, one Henry Bennett granted and released to the defendant the above-mentioned messuage to secure repayment of 500*l.* with interest. The messuage was then occupied by a grocer, who carried on his trade therein, and had placed on the ground-floor the ordinary fixtures used by grocers; he afterwards gave notice determining his tenancy, and removed his fixtures. The mortgagor Bennett died in September, 1881, and under his will and various mesne assignments the equity of redemption ultimately became vested in six persons as tenants in common. James Hunt, a draper and haberdasher, became, in March, 1883, yearly tenant to them of the messuage; and on entering into possession he placed in the shop certain counters, shelves, partitions of wood and glass, gas-pipes and burners, bells, and window blinds, for the purpose of his trade. Hunt's tenancy was never recognised or adopted by the defendant. Hunt, in August, 1883, mortgaged the fixtures then in and upon the premises to the plaintiff, together with an undivided sixth part which Hunt had bought from one of the six tenants in common in June, 1883, in the equity of redemption of the premises. The defendant, in July, 1884, under a power of sale contained in his mortgage deed, sold the messuage to a purchaser, together with the trade fixtures placed in the shop by Hunt, realising by the sale no more than enough to satisfy his mortgage. The plaintiff, before the sale, and before Hunt gave up possession of the premises, demanded the fixtures from the defendant, all of which could be removed without injury to the freehold. The question for the opinion of the Court was whether the plaintiff was entitled to recover the value of the fixtures, which as between all parties was to be taken at 100*l.*

Thorne, for the plaintiff.—If the fixtures had been placed in the messuage by the mortgagor of the messuage, or by himself and a partner, then no doubt *Cullwick* v. *Swindell* (1) shews that the fixtures could not have been removed. But the fixtures having been placed there by a tenant, they were removable by him or by any assignee from him.

He referred to *Keach* v. *Hall* (2).

T. J. Bullen, for the defendant.—The maxim "*quicquid plantatur solo, solo cedit*," although it has been relaxed as between landlord and tenant, applies still as between mortgagor and mortgagee; and Hunt, not having become tenant till after the mortgage to the defendant, had no valid tenancy as against the defendant, and therefore could not be in any better position as to the fixtures than Bennett, the mortgagor. *Cullwick* v. *Swindell* (1), and *Ex parte Cotton* (3) which was there cited, are decisive of the question before the Court.

He referred to *Meux* v. *Jacobs* (4).

Thorne, in reply, was stopped.

POLLOCK, B.—I have no doubt in this case that the plaintiff is entitled to the judgment of the Court. It is true that, as between a mortgagor and mortgagee, the mortgagee is clearly entitled to all fixtures which are upon the mortgaged premises at the time of the mortgage; and it has further been held that if a mortgagor, or a mortgagor and his partner, bring trade fixtures upon the mortgaged premises after the mortgage, the fixtures pass to the mortgagee. But the present case is very dif-

(1) 36 Law J. Rep. Chanc. 173; Law Rep. 3 Eq. 249.
(2) Dougl. 21.
(3) 2 Mont. D. & D. 725.
(4) 44 Law J. Rep. Chanc. 481; Law Rep. 7 H.L. 481.

ferent. Hunt, under whom the plaintiff claims, was a stranger to the mortgage to the defendant. And though Hunt may not, as against the defendant, have been strictly entitled to consider himself a tenant, yet he was certainly not a trespasser, being in occupation by permission of the mortgagor, whom the defendant had left in possession. Why, under those circumstances, should those fixtures put up by Hunt as trade fixtures pass to the defendant? There must, in my opinion, be judgment for the plaintiff for 100*l.*

MANISTY, J.—I am of the same opinion. The premises upon which the fixtures in question were placed were mortgaged to the defendant on the 1st of May, 1878. The mortgagor was permitted by the defendant to continue in possession and to deal with the property; and the shop in which these fixtures were placed was, in March, 1883, let by the then owners of the equity of redemption to Hunt, who, on entering into possession, placed the fixtures in question there. Why should the defendant be in a better position as to those fixtures as against Hunt, and the plaintiff to whom Hunt assigned them, than the mortgagor, or those to whom the mortgagor's equity of redemption passed? In equity, in common justice, the defendant ought not to be in any better position; and I agree with my brother Pollock that there is nothing to warrant our holding that the fixtures passed to the defendant.

Judgment for plaintiff.

Solicitors—Church, Rendell & Co., agents for H. K. Thorne, Barnstaple, for plaintiff; W. T. Watkins, Alcombe, Somerset, for defendant.

1885. June 17. } THE QUEEN *v.* THE JUSTICES OF DENBIGHSHIRE.

Poor—Valuation List—Appeal against Second Rate—Objection to Valuation List—Union Assessment Committee Amendment Act, 1864 (27 & 28 *Vict. c.* 39), *s.* 1.

[For the report of the above case, see 54 Law J. Rep. M.C. 142.]

[IN THE HOUSE OF LORDS.]

1885. April 20, 21, 23. May 12. } BARONESS WENLOCK AND OTHERS *v.* THE RIVER DEE COMPANY.

Company—Company Incorporated by Statute—Power to borrow—Ultra vires.

A company was incorporated by Act of Parliament for a particular object. The incorporating Act and subsequent amending Acts did not expressly authorise or forbid the company to borrow. In the year 1851 *an Act was passed which empowered the company to borrow for certain purposes and in a certain manner sums not exceeding in the whole* 50,000*l. Between* 1870 *and* 1878 *the company borrowed upon covenant under their seal large sums in excess of the amount of* 50,000*l. An action having been brought upon the covenant to recover these sums,*—Held (*affirming the decision of the Court of Appeal*), *that the action could not be maintained, for that whether or not the company had by implication power to borrow before* 1851, *they were by the Act of that year prohibited from borrowing except in accordance with its provisions.*

The decision in The Ashbury Company *v.* Riche (43 Law J. Rep. Exch. 177; 44 Law J. Rep. Exch. 185; Law Rep. 9 Exch. 224; ibid. 7 H.L. 653), *applies not merely to companies incorporated under the Companies Acts, but to all companies created by statute for a particular purpose.*

This was an appeal from a judgment of the Court of Appeal (Brett, M.R., Cotton, L.J., and Bowen, L.J.) reversing one of Huddleston, B.

By 6 Geo. 2. c. 30 (public Act) Nathaniel Kinderly, his heirs and assigns, and such persons as he, his heirs and assigns, should nominate and appoint under seal, were appointed undertakers of the navigation of the river Dee, and were empowered to make and keep the river navigable, and to take and receive certain dues and tonnages.

Nathaniel Kinderly nominated certain persons, who agreed to raise a joint stock capital of 40,000*l.*, and these persons were incorporated by 14 Geo. 2. c. 8 (public Act). Further powers were conferred

upon the company by 26 Geo. 2. c. 35 (public Act) and 31 Geo. 3. c. 88 (public Act).

None of these Acts expressly authorised or forbade the company to borrow.

By 14 & 15 Vict. c. lxxxvii. s. 24, the company was authorised to borrow two several sums of 25,000*l.* each for certain purposes and under certain conditions. The section is quoted in full in Lord Blackburn's judgment.

By 31 Vict. c. xxv. (local Act) a conditional power was given to raise additional capital and to borrow on mortgage a further sum of 25,000*l.* This power was never exercised.

The company improved the Dee navigation, and reclaimed from the river large tracts of land of great value.

In 1873 Lord Wenlock advanced 85,000*l.* to the company on mortgage of their lands, and in the same year a further sum of 8,000*l.* on a deed of further charge on the same lands. In 1878 he took a transfer of a mortgage upon lands of the company for 60,000*l.* executed in 1870. The said deeds of mortgage and further charge were executed with assent of all the stockholders of the company existing at their respective dates.

This action was brought by the appellants, as Lord Wenlock's executors, to recover on the covenants in the mortgage deeds the sum of 173,062*l.* 11*s.* 11*d.* with interest.

The company raised the defence that the borrowing had been *ultra vires*.

The action was tried at Chester Summer Assizes, 1882, before Huddleston, B., without a jury. The Judge was of opinion that the borrowing was *ultra vires*, but that the company, having received the money and applied it to their purposes, could not repudiate their liability to repay it.

On appeal, the Court of Appeal gave judgment for the appellants for 25,000*l.* with interest (it being admitted that borrowing was authorised to that extent by the Act of 14 & 15 Vict. c. lxxxvii.), and also for so much of the sums advanced as had been applied in payment of debts or liabilities of the company properly incurred, with interest; the amounts to be enquired into by a special referee. The judgment was without prejudice to any action the appellants might be advised to bring for enforcing any equities against the stocks or shares of the company, or any rights not expressly adjudicated upon thereby.

Rigby, *Q.C.*, and *C. H. Anderson*, for the appellants.—Every corporation, *prima facie*, is entitled to bind itself by deed under its seal in the same way as an individual. If it be constituted by charter there is no limitation to this proposition; if by statute, it has the power except so far as deprived thereof by statute—*The South Yorkshire Railway Company* v. *The Great Northern Railway Company* (1), *per* Parke, B. (in 1853), *The Eastern Counties Railway Company* v. *Hawkes* (2) (1855), *The Shrewsbury and Birmingham Railway Company* v. *The London and North Western Railway Company* (3) (1857), *Chambers* v. *The Manchester and Milford Railway Company* (4) (1864), *Taylor* v. *The Chichester and Midhurst Railway Company* (5) (1867), *Riche* v. *The Ashbury Railway Carriage Company* (6) (1874), *per* Blackburn, J., in the Exchequer Chamber.

In the last case in the House of Lords the general proposition was not disputed, but it was held that there was an express prohibition in the Companies Acts.

Borrowing powers were impliedly given as necessarily incident to the objects of the company as defined by the incorporating Act—*The Attorney-General* v. *The Great Eastern Railway Company* (7). In case of a storm damaging the embankment, it might be vital to get money suddenly in any way possible. The special borrowing powers conferred by the Acts of 1851 and

(1) 9 Exch. Rep. 55; 22 Law J. Rep. Exch. 305.

(2) 5 H.L. Cas. 331; 24 Law J. Rep. Chanc. 601.

(3) 6 H.L. Cas. 113; 26 Law J. Rep. Chanc. 482.

(4) 5 B. & S. 588; 33 Law J. Rep. Q.B. 268.

(5) 39 Law J. Rep. Exch. 217; Law Rep. 4 H.L. 628.

(6) 43 Law J. Rep. Exch. 177; 44 ibid. 185; Law Rep. 9 Exch. 224; ibid. 7 H.L. 653.

(7) 49 Law J. Rep. Chanc. 545; Law Rep. 5 App. Cas. 473.

1868 were not inconsistent with general powers. The special powers were of a superior kind, and enabled the company to borrow to a limited amount, with a Parliamentary charge in priority to other debts.

Davey, *Q.C.*, and *A. R. Kirby* (*Clement Higgins* with them), for the respondents.—It is not disputed that if a company be formed for trading, power to borrow is necessary, and need not be expressly given. Possibly this company might have given a charge to pay for works they were authorised to make—*The Attorney-General* v. *The Great Eastern Railway Company* (7), *Colman* v. *The Eastern Counties Railway Company* (8), *Brimelow* v. *Murray* (9), *Cunliffe Brooks & Co.* v. *The Blackburn Benefit Building Society* (10), and *Chambers* v. *The Manchester and Milford Railway Company* (4). Implied power is implied only when necessary for particular purposes, and cannot be carried beyond what is necessary.

Rigby, *Q.C.*, in reply.—There was implied power to borrow under the incorporating Act. The Acts of 1851 and 1868 dealt only with mortgages; and even if they limited the power to mortgage, the deeds here are good as covenants.

Cur. adv. vult.

LORD BLACKBURN (on May 12).—The Legislature originally by the 6 Geo. 2. c. 30 made "Nathaniel Kinderly, gentleman, his heirs and assigns, and such persons as the said Nathaniel Kinderly, his heirs or assigns, shall nominate and appoint, undertakers of the navigation of the river Dee." The undertakers were not in that Act in terms made a corporation, and a good deal of argument was based on the supposition that whatever they did under that Act was done by them as individuals, and whatever was given to them by that Act was given to them as individuals. This I very much doubt. I think if the servants of the undertakers had been guilty of some act of negligence, for which their masters were responsible, the person injured might have recovered judgment for damages against the undertakers, and taken in execution the undertakers' goods and lands; but I doubt very much whether he could have enforced judgment by taking Nathaniel Kinderly under a *ca. sa.*—and if the man's person could not be taken, neither could his private goods and lands. In other words, I think it at least doubtful whether the undertakers were not made a *quasi* corporation, a corporation *ad hoc*; but it is not necessary to form any final opinion as to this. By the 14 Geo. 2. c. 8, after a long recital of who the undertakers were, and the purposes for which they had become undertakers, the then undertakers are "united into one company for the purposes aforesaid, and shall be one body politic and corporate."

There are various Acts, in none of which is anything said in express terms either to give the corporation power to borrow, or to forbid it to borrow, till the 14 & 15 Vict. c. lxxxvii., which received the royal assent on the 24th of July, 1851. Up to that time, therefore, I apprehend that the question whether the corporation could or could not borrow must, according to what since the decision of *The Ashbury Company* v. *Riche* (6) in this House I understand to be the law, depend upon what "the purposes aforesaid," for which the company were by statute incorporated, were; whether such as to make it reasonable to think that the Legislature intended they should have such a power or not.

The 24th section of the 14 & 15 Vict. c. lxxxvii., is in the following words: "That it shall be lawful for the said company from time to time, as they shall think proper or see occasion, but not further or otherwise, for all or any of the purposes of this or the said recited Acts or any of them, to borrow at interest upon bond, or upon mortgage of the lands already recovered and inclosed or hereafter recovered and inclosed by the said company or otherwise belonging to them, or partly upon bond and partly upon such mortgage as aforesaid, any sum or sums of money which shall from time to time, by an order or vote of a general court of the said company, be authorised to be borrowed, and which shall not exceed in the whole

(8) 10 Beav. 1; 16 Law J. Rep. Chanc. 73.
(9) 53 Law J. Rep. Chanc. 745; Law Rep. 9 App. Cas. 519.
(10) 54 Law J. Rep. Chanc. 376; Law Rep. 9 App. Cas. 857.

the sum of twenty-five thousand pounds; and it shall also be lawful for the said company from time to time, as they shall think proper or see occasion, for the purpose of improving the navigation, or for reimbursing to the said company any sum or sums of money that may be due to them upon the toll account, to borrow at interest, upon mortgage of the tolls, rates, and duties to be received by the company under the authority of this Act, any sum or sums of money which shall in like manner as aforesaid be authorised to be borrowed, and which shall not exceed a further total sum of twenty-five thousand pounds; and in the event of any part of such money being repaid, the company may again in like manner borrow any sum or sums of money not exceeding the amount of the money repaid, and so *toties quoties*, but so, nevertheless, that there shall not be owing upon the security of the said lands so charged as aforesaid at any one and the same time a greater sum than twenty-five thousand pounds, nor upon the security of the said tolls, rates, and duties so charged as aforesaid at any one and the same time a greater sum than twenty-five thousand pounds: provided always that any such mortgage as is hereinbefore authorised to be made shall be subject to the annuities of two hundred pounds and fifty pounds payable respectively to the Hawarden Embankment trustees, and of two hundred and fifty pounds payable to the Dee Ferry Road trustees, so long as such annuities or any part thereof shall continue payable."

I can hardly, after reading that enactment, and remembering what had been decided in *Chambers* v. *The Manchester and Milford Railway Company* (4), doubt that the Legislature did there express an intention that the company should thenceforward have power to borrow 25,000*l.* and no more. There is nothing in the subsequent Act of 1868 (31 Vict. c. xxv.) to shew that the Legislature altered that intention. And as all the covenants sued on were executed after 1851, the earliest being in 1870, this alone is sufficient to lead me to affirm the judgment.

It is not necessary to decide anything as to the effect of *The Ashbury Company* v. *Riche* (6). The course the argument took makes me think it proper to say—though it is quite true, as Mr. Rigby said, that it was not necessary for the decision in *The Ashbury Company* v. *Riche* (6) to do more than decide what the law was with regard to a company formed under the Companies Act of 1862—that I think the law there laid down applies to all companies created by any statute for a particular purpose. I think that if I were to confine the effect of the decision to companies created under the Act of 1862, and to say it did not extend to such a corporation as this, I should do wrong. The law is proverbially uncertain. That cannot be helped. But I think I should unjustifiably add to the uncertainty if I set an example of adhering to my previous reasoning (even should I still think it better than that of noble and learned Lords who decided against it) in every case not precisely involving the very same point.

I think *The Ashbury Company* v. *Riche* (6) is a binding authority to the extent indicated in *The Attorney-General* v. *The Great Eastern Railway Company* (7).

I therefore move that the judgment be affirmed, the appellants to pay the costs.

Lord Watson.—I also am of opinion that the order of the Court of Appeal ought to be affirmed.

I do not think it is necessary for the purposes of this case to determine whether under the provisions of 14 Geo. 2. c. 8, by which they were incorporated, or of the other Acts passed during last century, in relation to their constitution and objects, the respondent company had or had not power to borrow money for the purposes of the statutory undertaking. The Acts in question do not expressly authorise the company to borrow; so that the power, if it existed, must have been derived by implication from their provisions.

I am, however, willing to assume that these earlier statutes did give the company an implied authority to borrow, although I am not at present satisfied that such was the case.

The company, in the year 1851, applied for and obtained from Parliament authority to borrow at interest, upon bond or mortgage of their lands, any sum or sums not exceeding 25,000*l.*, and also to borrow, to the same amount, upon mortgage of the

statutory tolls and rates leviable by them. The 24th section of 14 & 15 Vict. c. lxxxvii., by which that authority is conferred, provides "that it shall be lawful for the said company from time to time as they shall think proper or see occasion, but not further or otherwise, for all or any of the purposes of this or of the said recited Acts or any of them, to borrow" to the amount thereby authorised. The said recited Acts include not only all the previous statutes relating to the company, but the earlier Act, 6 Geo. 2. c. 30, which vested in Nathaniel Kinderly, his heirs, assigns, or nominees, the undertaking subsequently transferred to the company by 14 Geo. 2. c. 8. In 1868 the company obtained another Act (31 Vict. c. xxv.) which empowered them to raise, in addition to the sums already authorised, the further sum of 40,000*l.* by the issue of new shares or stock.

The qualification attached by the Legislature to the borrowing powers sanctioned by the Act of 1851, was, in my opinion, fatal to the continued existence of any implied power which the company had under their previous statutes. It is unnecessary to consider what might have been the effect of the legislation of 1851 upon the rights of a creditor who, before its date, had lent money to the company; because the earliest of the loans which the appellants are seeking to recover was made in 1870. The provisions of 14 & 15 Vict. c. lxxxvii. s. 24, constitute, if not an express, at least a very plainly implied prohibition against the company exercising for the future, in addition to the powers given by that Act, any power of borrowing derivable by implication from the terms of any previous Act.

Upon that construction of the statutes applicable to the respondent company, I should have been prepared to affirm the judgment of the Court of Appeal, even if I had been satisfied that Mr. Rigby's argument upon the law was well founded. His contention was that the company must be held to possess, as one of the legal incidents of a corporation, the power of borrowing money in furtherance of its statutory objects, unless the Acts which regulate its constitution, either expressly or by implication, prohibit the exercise of the power. I think that such a prohibition is to be found, in this case, in the Act of 1851.

But I cannot assent to the doctrine which was contended for by Mr. Rigby. Whenever a corporation is created by Act of Parliament, with reference to the purposes of the Act, and solely with a view to carrying these purposes into execution, I am of opinion not only that the objects which the corporation may legitimately pursue must be ascertained from the Act itself, but that the powers which the corporation may lawfully use in furtherance of these objects must either be expressly conferred or derived by reasonable implication from its provisions. That appears to me to be the principle recognised by this House in *The Ashbury Company* v. *Riche* (6) and in *The Attorney-General* v. *The Great Eastern Railway Company* (7).

LORD FITZGERALD.—I concur in the decision which has been announced. The objects for which the respondent company, being a statute corporation, was incorporated must be collected from the statute of incorporation, and the powers of the company taken to be limited to those expressed in the statute, or to be properly implied as incident to the purposes for which the corporation was created.

Upon a more careful examination of the incorporating Act (14 Geo. 2. c. 8) and of the amending or enlarging Acts down to the Dee Standard Regulation Act of 1851, I have been unable to satisfy myself that any of them, either expressly or by fair implication, authorised the company to enter into the engagements the legality of which is questioned in the present action.

It is observable that during the period of 128 years between the incorporating Act and the statute of the Queen passed in 1868, the supposed borrowing powers for which Mr. Rigby contended do not appear to have been exercised.

I do not think that words of prohibition were necessary to limit the powers of the company, but if prohibition were necessary to render the contracts in question illegal, we have that prohibition sufficiently expressed in the Acts of 1851 and 1868.

Wenlock v. *River Dee Co.*, *H.L.*

I have come to this conclusion unwillingly, but am not without hope that some means of indemnification may be found to be still open to the appellants.

Order appealed from affirmed, and appeal dismissed, with costs.

Solicitors—Emmet, Son & Stubbs, agents for Leeman, Wilkinson & Badger, York, for appellants; Ashurst, Morris, Crisp & Co., for respondents.

[IN THE COURT OF APPEAL.]

1885. July 23. THE QUEEN *v.* THE GUARDIANS OF THE POOR OF ST. MARY, ISLINGTON. *In re* ALICE DAVIS.

Poor—Derivative Settlement—39 & 40 *Vict. c.* 61. *s.* 35—*Child—Pauper above the age of sixteen.*

[For the report of the above case, see 54 Law J. Rep. M.C. 146.]

1885. July 2. THE SCHOOL BOARD FOR LONDON (*appellants*) *v.* WOOD (*respondent*).

Elementary Education Act (33 & 34 *Vict. c.* 75), *s.* 74—*School Board By-laws—Causing Child to attend School—Child sent to School without Payment of prescribed Fee—Liability of Parent to Penalty.*

[For the report of the above case, see 54 Law J. Rep. M.C. 145.]

[IN THE HOUSE OF LORDS.]

1885. March 26, 27, 30. INGLIS *v.* STOCK.

Ship and Shipping—Marine Insurance—Policy on Goods—Contract of Sale f. o. b.—Loss of Goods—Non-appropriation of Goods at Time of Loss—Vesting of Property—Insurable Interest.

The plaintiff claimed to recover from the defendant, an underwriter at Lloyd's, under a floating marine policy on goods, in respect of certain sugar lost on the 4th of February, 1881, *on a voyage from Hamburg to Bristol. The sugar so lost had been shipped in performance of two contracts entered into by D. & Co. (London merchants) with the plaintiff (a merchant at Bristol) and B. & Co., as hereinafter mentioned.*

By the first contract, dated the 7th of January, 1881, *D. & Co. agreed to sell to B. & Co.* 200 *tons of sugar of a certain quality, to be shipped from Hamburg to Bristol, at* 21*s.* 9*d. per ton net f. o. b., and for January delivery at Hamburg, payment by cash in London in exchange for bill of lading. By the second contract, dated the* 12*th of January*, 1881, *D. & Co. agreed to sell to the plaintiff a similar quantity at a like price upon identical terms. D. & Co. were not aware until after the loss that B. & Co. had entered into the contract of the 7th of January for the purpose of enabling them to execute a contract previously made by them with the plaintiff on the same day for the sale of* 200 *tons of sugar at an advanced price, neither was the plaintiff aware that D. & Co. were the shippers of the* 200 *tons which he had contracted to take from B. & Co. The plaintiff, immediately after making the above contracts with B. & Co. and D. & Co. respectively, entered into binding contracts for the sale of the identical quantities of sugar agreed to be sold to him, and upon identical terms, except that the sale was at an advanced price which left the plaintiff a clear profit. D. & Co. advised their Hamburg forwarding agents that they had sold* 400 *tons of sugar for Bristol, and directed them to obtain and ship the necessary number of bags to that port, and to send the bills of lading to London as soon as possible.*

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The whole of the sugar not having arrived at Hamburg at the time of the departure of the steamer, D. & Co's. forwarding agents at Hamburg shipped 3,900 *bags only, and advised D. & Co. of this short shipment, proposing to send the* 100 *bags short-shipped by the next steamer. The* 3,900 *bags so shipped were consigned to "Order, Bristol," and the agents, in accordance with the ordinary course of business between themselves and D. & Co., duly forwarded the bills of lading indorsed in blank to certain bankers in London, who were instructed to deliver them to D. & Co. against cash payment of the amount of the invoices, being the price paid by D. & Co's. agents to the manufacturers upon delivery. No appropriation was, or indeed could be, made of any specific bags under the above contracts at the time of shipment, but the whole* 3,900 *bags were shipped in one undistinguished mass consigned simply "Order, Bristol." With this sugar on board, the ship left Hamburg on the 3rd of February, and on the following day went down with her cargo. Before intelligence of the loss, D. & Co. in due course took up the bills of lading, and then proceeded to apportion the* 3,900 *bags, appropriating* 2,000 *of such bags to B. & Co., and the remaining* 1,900 *to the plaintiff, and making out invoices accordingly, and so as to comply with the terms of each contract. The invoices were then posted by D. & Co., but prior to that time both they and the plaintiff had had intelligence of the loss of the sugar. Thereupon the plaintiff, anticipating that the* 200 *tons of sugar coming to him under his contract with D. & Co. might have been despatched on board the ship, although without any specific advice of such shipment, declared on the ship under his floating policy in respect of these* 200 *tons. Upon receipt of the invoices the plaintiff and B. & Co. respectively paid D. & Co. for the amounts named in such invoices, and obtained the bills of lading of the sugar invoiced to them under their respective contracts. Thereupon B. & Co. made out and forwarded his invoice to the plaintiff, who paid what was due from him to B. & Co., and received in return the bills of lading for the* 2,000 *bags so invoiced. The plaintiff then also declared upon his floating policy for this further loss:*—Held (*affirming the decision of the Court of Appeal*), *that the plaintiff, being bound to pay for the sugar lost or not lost, had an insurable interest which entitled him to recover on the policy.*

This was an appeal from a decision of the Court of Appeal reversing one of Field, J. The case is reported in the Courts below 52 Law J. Rep. Q.B. 30; 53 ibid. 356. The facts are stated in the report of the proceedings before Field, J., and in the Lord Chancellor's judgment.

The Solicitor-General (*Sir F. Herschell, Q.C.*) and *Cohen, Q.C.* (*J. Gorell Barnes* with him), for the appellant.—At the time of the loss there had been no appropriation by Drake between Beloe and Stock. The property in the goods therefore remained in Drake. There is no evidence of any general custom of trade, or even of any course of business of Drake assented to by their customers, to appropriate after loss. It was not immaterial which bags were apportioned to Stock and which to Beloe; the quality was not identical, and one or other portion must be 100 bags short. It can make no difference that Stock was sub-purchaser of the bags he had not bought direct from Drake, for he bought them at a higher price than the others, and his interests would be affected by the mode of apportionment. Under the contracts Drake were required to place on board goods specifically appropriated. By not doing so it may be they committed a breach of contract, though no doubt one which would have been waived if there had been subsequent appropriation, before loss, of goods answering the contract. The usual practice where goods are shipped for several purchasers is to have a bill of lading for each purchaser. Here all the bills of lading were made out to Drake's agent, and he distributed them on arrival. Suppose a jettison of 200 tons, and Stock not insured, could Drake, after loss, say that the 200 tons thrown overboard belonged to Stock?

It has been decided that there is no insurable interest in goods unless they have been appropriated before loss—

Anderson v. *Morice* (1), *Seagrave* v. *The Union Marine Insurance Company* (2), and *Ebsworth* v. *The Alliance Marine Insurance Company* (3).

C. Russell, *Q.C.*, *Reid*, *Q.C.*, and *Danckwerts*, for the respondent, were not called upon.

THE LORD CHANCELLOR (EARL OF SELBORNE).—The question in this case is whether the plaintiff had, at the time of the loss of the steamer *City of Dublin* in the river Elbe, on the 4th of February, 1881, an insurable interest in 3,900 bags (or 390 tons weight) of sugar, part of that vessel's cargo. The Court of Appeal, reversing a judgment of Mr. Justice Field, decided in the plaintiff's favour.

By two contracts, dated respectively the 7th and 12th of January, 1881, which were (except as to dates and parties) identical in their terms, Messrs. Drake & Co., merchants, of London, agreed to sell to one Beloe and to the plaintiff respectively 200 tons each of German beet-root sugar, to be shipped from Hamburg. The material terms of the contract between Drake and Beloe are these:—"London, 7th January, 1881. Messrs. W. Beloe & Co.,—We have this day sold to you for your account 200 tons German beet-sugar of the crop 1880–81, at 21*s.* 9*d.* per cwt. of 50¾ kilos. net f. o. b. Hamburg, for 88 degrees net saccharine contents." I need not read all the details. "The sugar shall analyse between 85/92 net, both inclusive; sixpence per cwt. to be paid or allowed for each degree above or below 88 (fractions in proportion), but anything above 92 not to be paid for. Should the average analysis of whole contract exceed 90, such excess is not to be paid for. The analysis is to be effected by a public German chemist." Then, omitting some immaterial points, it goes on: "For January delivery at Hamburg. Payment by cash in London, in exchange for bill of lading, less two months' interest at 5 per cent. per annum. Any dispute arising out of this contract to be settled by arbitration of two London brokers in the usual way."

By another contract dated the 7th of January, the plaintiff bought from Beloe the sugar which Beloe had contracted to buy from Drake & Co., upon substantially the same terms, except that the price to be paid for it to Beloe was to be 21*s.* 10½*d.* per cwt., subject to like variations between the same limits, and that the average analysis of the whole contract was "not to exceed 90." The price, therefore, in each case was to be variable, according to the percentage of saccharine matter in the sugar; the goods were in each case to be delivered at Hamburg free on board, and (consequently) were, after shipment, to be at the purchaser's risk; and the bills of lading were to be retained by the vendors till the purchase-moneys were paid.

The plaintiff and Beloe at Bristol, and the agents of Drake & Co. at Hamburg, engaged space for these sugars in a general ship, the *City of Dublin*, one of a line of steamers trading between Bristol and Hamburg. The shipping agents at Bristol, being informed by the plaintiff of his two purchases from Beloe and Drake & Co., and learning from Beloe that Drake & Co. were his vendors, advised their correspondents at Hamburg that 400 tons of sugar would be coming for that ship's cargo from Drake. I do not think it material, but it is proper to notice that the plaintiff did not know from whom Beloe had bought, and Drake & Co. did not know that Beloe had sold to the plaintiff till after the loss.

The quantity actually put on board the *City of Dublin* at Hamburg was only 3,900 bags, or 390 tons. As to this, I think it enough to say that if the plaintiff would have had an insurable interest in 4,000 bags, under the circumstances of the case he had, in my opinion, such an interest though the quantity was short by ten tons.

No other sugar belonging to Drake & Co. was put on board this ship. The 3,900 bags were, therefore, specifically separated from the bulk of the vendors' own sugar; and they were shipped under Drake & Co.'s contracts with Beloe and the plaintiff, with a view to and in fulfilment of the agreement of Drake & Co., as vendors, to put the purchased sugars

(1) 46 Law J. Rep. C.P. 11; Law Rep. 1 App. Cas. 713.
(2) 35 Law J. Rep. C.P. 295; Law Rep. 1 C.P. 803.
(3) 42 Law J. Rep. C.P. 305; Law Rep. 8 C.P. 596.

"free on board." The present controversy arises out of the manner in which this was done. Each bag was distinguished by a mark denoting its percentage (according to certified analysis) of saccharine matter; and ten bills of lading, for parcels bearing marks corresponding with those on the bags, were made out in an impersonal form, and sent (according to the contracts) to Drake & Co., to be retained by them till the time of payment should arrive. The aggregate consignment (except as to the deficiency of 100 bags) was proper and suitable to fulfil the two contracts, without exceeding as to either of them the average of ninety per cent. of saccharine matter; and (according to the evidence of Mr. Hales, a partner in the firm of Drake & Co.) it was made up and "ordered forward" as being "so divisible." But no particular bags were then set apart or marked as applicable to the one contract more than the other; it was thought sufficient by Drake & Co., or their agents, to leave this to be done when the bills of lading came forward. There would be no practical difficulty in doing it in a proper and reasonable way, even if the plaintiff had not purchased Beloe's contract, inasmuch as neither purchaser could claim, and Drake & Co. were not to be paid for, any excess beyond ninety per cent. of the average analysis of the whole contract; though it was conceivably possible that it might have been done perversely and unreasonably. The division was, in fact, made by Drake & Co., who forwarded invoices of the parcels attributed to each purchaser on the evening of the 4th of February, after they had received notice of the loss. In the division so made the deficiency of ten tons was ascribed to the plaintiff's contract, being the later in date. No question was raised by the plaintiff or by Beloe, and the purchase-moneys were paid by the plaintiff according to the contracts and invoices. But by this, which was done after the loss, the underwriters were (of course) not bound.

It is contended on the part of the appellant that, under these circumstances, and for want of a proper division before the loss, the shipment had not the effect of divesting the prior title of Drake & Co., the vendors, or of passing any interest in these sugars to the plaintiff. This argument appears to me to confound two very different things: the appropriation necessary as between vendor and purchaser, and the division, as between purchaser and purchaser, of specific goods actually appropriated to the aggregate of the two contracts. I do not think it follows that there could be no appropriation by the vendors of which the purchasers might take the benefit, merely because the parcels of goods appropriated were mixed, in the act of appropriation, so as to require some subsequent division or apportionment. Whether this may have happened by previous agreement or course of dealing between all the parties (in which case there could be no serious doubt), or by accident, error, or want of proper care on the vendors' part, appears to me to make no difference in principle. The purchasers might possibly be entitled to reject, but the vendors could not, in my opinion, without their consent, retract the appropriation.

In the present case I see no reason to doubt that the difficulty arising from the confusion of parcels—material only to the settlement of the amounts payable by the plaintiff to his two vendors—if not solved by consent, or by arbitration, for which each contract provided, would have been soluble by principles of law applied to the facts and the terms of the contracts. The necessity for doing this, and the fact that it had not been done at the time of the loss, do not, in my opinion, sufficiently distinguish this case from *Browne* v. *Hare* (4), and earlier authorities to the same effect. The goods were, by the act of the vendors, separated from the bulk of all other goods belonging to them; they were shipped "free on board" in what (for that purpose) was the purchaser's ship, under two contracts so to deliver them, in both which contracts (subject to the payments to be made by him to Drake & Co. and Beloe), the plaintiff was then (although Drake & Co. did not know it) solely interested. I cannot infer from any part of the evidence that, in so shipping them indiscriminately, the vendors intended to break instead of fulfilling their contracts, and to take upon

(4) 3 Hurl & N. 484; 4 ibid. 822; 27 Law J. Rep. Exch. 372; 29 ibid. 6.

themselves (contrary to those contracts) the subsequent risk of loss and the liability to freight. Yet this (as it seems to me) would be the necessary consequence of the appellants' argument.

I think the order appealed from is right, and I move your Lordship to affirm it and to dismiss the appeal with costs.

LORD BLACKBURN.—I also agree that there is no occasion to hear the counsel for the respondent.

The respondent (plaintiff below) had insured himself by floating policies to the extent of, as I understand, 5,000*l.* One of the policies is set out as a sample policy. It is a policy for 4,000*l.*, part of 5,000*l.*, and is marked on the margin No. 4247. By it the respondent caused himself to be insured in respect of goods conveyed in a steamer "from the continent of Europe between Havre and Hamburg, both ports included, and/or Rouen and/or Nantes, to Bristol upon any kind of goods and merchandises," "beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship at as above upon the said ship, &c., including all risks of craft, and so shall continue and endure during her abode there upon the said ship, &c. And, further, until the said ship with all her ordnance, tackle, apparel, &c., and goods and merchandises whatsoever, shall be arrived at as above upon the said ship, &c., until she hath moored at anchor twenty-four hours in good safety, and upon the goods and merchandises until the same be then discharged and safely landed." Then I pass over a sentence which is immaterial for the present purpose. "The said ship, &c., goods and merchandises, &c., for so much as concerns the assured by agreement between the assured and assurers in this policy, are and shall be valued at 4,000*l.*, part of 5,000*l.* on sugar to be hereafter valued and declared. To follow policy for 4,000*l.* No. $\frac{3}{4247}$, dated the 6th of December, 1880." The meaning of to be "hereafter valued and declared" is, that if the insured has several adventures, all, within the description in the policy, out, he may select at his pleasure which is to be protected by the policy, and, on his giving notice of such a selection to the insurers, the policy is as if it had named that adventure from the beginning. Of course, if adventures had been previously named, these come first, and whether those prior subjects of insurance are lost or not, the policy is equally *pro tanto functus officio*. And I believe the practice is, if there is nothing to shew that the first adventure which came in safe was selected not to be under the policy, it is taken to be so, though there is no declaration.

The meaning of "To follow policy for 4,000*l.* No. $\frac{3}{4247}$" is, that there being consecutive policies, any loss declared is to be borne first by the earlier policies, and that it is not till after the policy No. $\frac{3}{4247}$ is exhausted, either by losses or declared adventures which have come in safe, that the underwriters on the policy which follows are to bear the balance of the loss, if any. There is not, so far as I remember, any other difference between a policy in the present form, with a declaration that it is on sugar valued at 3,800*l.* loaded in the *City of Dublin* steamer sailed from Hamburg to Bristol on the 3rd of February, 1881, and an ordinary policy for the same sugar valued at the same sum on the same steamer on the same voyage.

The defendant below is an underwriter for 150*l.* on each of these consecutive floating policies.

There is no dispute, at least now, that the *City of Dublin* is such a steamer and the voyage such a voyage as was within the terms of the policies, nor that the values and declarations were properly given, nor that there was enough left unexhausted on the policies to enable the underwriters to pay a total loss. But it was said that the situation of the plaintiff with regard to the sugars was not such as to give him an insurable interest. And I have no doubt that in order to recover against an underwriter the assured must shew that he suffers loss in respect of the thing insured. In case of an insurance on goods, if he shews that he had at the time of the loss the whole legal property in the goods which were lost, he undoubtedly does shew it. But I do not agree that this is the only way in which he can shew an insurable interest in goods, or that any relation to goods such that if the goods perish on the voyage the person will

lose the whole, and if they arrive safe will have all or part of the goods, will not give an interest which may be aptly described as goods.

In the present case there has been a good deal of extraneous matter brought into the discussion. I think if it had been remembered that the three contracts—namely, that of the 7th of January between Drake and Beloe, that of the same date between Beloe and the plaintiff, and the contract of the 12th of January between Drake and the plaintiff—were all in writing, and it had been seen that they are so expressed that, as in my opinion, there is no doubt as to their construction, the objection would have been much more clearly raised, not I think for its benefit.

Drake & Co., of London, who were large importers of beet-sugar manufactured in Germany, made a contract with Beloe, of Bristol, who sometimes, as we find, bought to sell again. There are, I gather from a letter of the 25th of January from Hermann, of Hamburg, to Drake, trading lines of steamers running twice a month from Hamburg to Liverpool, Leith, and Bristol, and it may be other places; but to London, and it may be other places, if a steamer is wanted from Hamburg it must be chartered, but of course it may be chartered.

And now by the contract Drake & Co. bound themselves to Beloe to supply 200 tons of German beet-sugar of the crop of 1880–81. It was not only to be German beet-sugar, but it was to analyse between 85 and 92, "but anything above 92 not to be paid for;" so that it would seem that sugar below 85 would not fulfil the description in the contract, but sugar above 92 might be given in fulfilment of the contract, though the excess was not to be paid for. No portion of the sugar now in dispute was either below 85 or above 92, so that this term does not come into operation. The sugar was to be "net free on board Hamburg," and it was for January delivery at Hamburg. The price was to depend on the "average analysis of the whole contract." "Should the average analysis of the whole contract exceed 90, such excess is not to be paid for." The Solicitor-General raised an argument on this clause which I shall notice by-and-by. The price was to be paid in London in exchange for bill of lading.

Now, under this contract the first thing to be done was by Beloe (the buyer). He must let Drake, the seller, or rather supplier, know in due time on what ship the goods were to be shipped free on board, for till he knew that Drake could not put the goods on board. Beloe might (as in fact he did) engage to put sugar on board several steamers bound to Bristol, but he might have made an engagement to ship sugar for Leith and wish to have the sugar put on board the Leith steamer. Or he might (though that was less likely) have chartered a steamer for London, or any other port, and wish the sugar to be put on board that. As soon as he had secured room in the steamer he did select, and let Drake & Co. know in good time on what steamer they were to ship them, Drake & Co.'s part of the contract begins; they are bound to have there at Hamburg, and to ship free on board that ship, 200 tons of sugar answering in all respects the description in the contract. Provided sugar of the proper quantity and description was put on board that ship, it was no concern of Beloe's where or how Drake & Co. got it. So soon as they had done that they had fulfilled their part of the contract so far. But the price was to be paid in London in exchange for bill of lading. And no doubt from that it is to be implied that Drake & Co. were to take a bill or bills of lading for the sugar they put on board, and were in due time to be ready and willing to give the bills of lading in London in exchange for the price. If Drake & Co. did this Beloe was bound to pay the price.

Now, Beloe had on the same day, but whether before or after he had made the contract with Drake & Co. does not appear, made a contract with the plaintiff to supply him with 200 tons of sugar at 1½*d.* a cwt. higher price than that at which Drake had agreed to supply Beloe. As the plaintiff knew where he wanted the sugar, this was to be shipped "free on board A 1 steamer to Bristol." The description of the sugar was the same as that in the contract between Drake and Beloe, except that it was said "average analysis not to exceed 90." The Solicitor-

General said that if the average analysis exceeded 90, Beloe was bound to take it from Drake, but not to pay the excess in price; but the plaintiff was not bound to take this more valuable lot at all, but would be in his right if he rejected it. What would have been the case if that point was raised by the facts we need not enquire, though I have a strong suspicion that a jury would not much favour it.

But, on looking at the documents, it appears that not only were the averages under 90, but that by no possible shuffling of the 3,900 bags actually put on board the *City of Dublin* could 2,000 bags have been selected the average of which would exceed 90. The plaintiff did not know, and had no reason to enquire, where Beloe was to get the sugar with which he was to supply him. The plaintiff saw Edward Stock (his nephew as it happens, but that is immaterial), the agent for the Bristol line of steamers, and, according to the evidence of both the Stocks, the plaintiff's directions were to secure room for the 200 tons in the steamer which would leave at the end of the month; and on the 11th of January Edward Stock & Son, the Bristol agents for the steamers, wrote to Nisstle & Günther the following letter: —"There are 200 tons of sugar sold for shipment the second half of this month, but we have not yet ascertained the names of the shippers. There are also further parcels in treaty," and so forth. This, it must be noticed, was before the contract between Drake and the plaintiff on the 12th of January; and how there can be any doubt raised that the plaintiff did his best as far as regards securing room on that steamer to take on board the sugar which Beloe was to ship or cause to be shipped, I am unable to conceive. He had to advise Beloe of this, and it is sworn that he did so, and I see no possible reason for doubting that he did.

The position of things then as between Beloe and the plaintiff was this: The plaintiff had done his part, and unless Beloe, by himself, or Drake, or any one else, put the proper quantity of sugar of the proper description on board the steamer the plaintiff had a cause of action against Beloe. If Beloe did put the proper quantity on board he was entitled to recover the price in exchange for bills of lading, and it was no answer that the goods had perished at sea before the bill of lading was offered. He did send an invoice specifying the marks and numbers of 2,000 bags, undoubtedly put on board, which Beloe alleged had been shipped on plaintiff's account.

If these were proper bills of lading for the sugar shipped, it is difficult to imagine a clearer case of a loss of sugar. It is said the bills of lading which he offered to give in exchange for the cash were not the bills of lading of goods shipped for him on the *City of Dublin*, and therefore he was not bound to pay in exchange for such bills of lading; instead of being liable to pay Beloe the price, he had an action against him for breach of contract in not shipping as he ought to have done. This requires us to notice some more of the evidence.

When on the 12th of January the plaintiff had made his contract with Drake, he at once proceeded to Edward Stock & Sons, who on that very day advised Nisstle & Co. that the 200 tons were coming: so that the plaintiff had done his part in securing room for that 200 tons, and if Drake & Co. have not shipped them he has a cause of action against them. They did not ship the whole 200 tons, but only 190 tons—10 tons, or 100 bags, meant to be shipped having been delayed—for that Drake & Co. sent an invoice and received payment. And, as I said about Beloe, if Drake & Co. have offered the plaintiff bills of lading for goods which were not shipped for him, he has a cause of action against Drake & Co., and was not bound to pay. But if Drake & Co. have fulfilled their contract, and the bills of lading are those referring to the 1,900 bags, then the subsequent loss by perils of the sea is no answer. The plaintiff must pay the price, and has lost it, and that is as clear a loss as can well be.

When Drake & Co., or rather their agents at Hamburg, were shipping the sugar and held the mate's notes, it was no doubt their business to see that a proper bill of lading for each separate shipment was signed; and if at any time before the bills of lading left Hamburg they had

been allocated to each shipment, no objection, not even an idle one, could have been raised. But, instead of doing so, the whole of the bills were sent in a lump to London that they might be allocated there. This was perfectly *bona fide*. Drake & Co. had no interest in favouring one more than the other, and were to be paid exactly the same price per bag whether they allocated it to the one or to the other. And if they had done this before the loss, I do not see what damage either Beloe or Stock could have sustained by the allocation being made in London instead of in Hamburg.

Now, I have been quite unable to see, even if the plaintiff had sustained some damage, that it could have been damage going to the whole root of the matter, so as to form a defence for the plaintiff against an action by either Drake & Co. or Beloe for not paying for the goods in exchange for the bills of lading—that is, supposing the plaintiff (because prices had greatly fallen, or from any other unworthy motive) had wished to get off.

And if it were so, I think the case would fall entirely within what Lord Hatherley, in *Anderson* v. *Morice* (1), says is the principle of *Sparkes* v. *Marshall* (5). The insurers have no right to call upon the insured to exercise a possible option to be released from their contract. But the loss having happened before the actual allocation, the plaintiff's loss, when it happened, was a loss not of 200 tons, but of 200 tons parcel of 390 tons, so that the loss, though exactly the same, is said not to be the same in description, because it is the loss of an undivided portion of the goods, instead of being the loss of the goods themselves. I am quite unable myself to perceive why that should make the slightest difference. In the merits, certainly it does not. I am quite unable to perceive why an undivided interest in a parcel of goods on board a ship may not be described as an interest in goods just as much as if it were an interest in every portion of the goods. No authority was cited in order to shew that it was not so, and I can see no reason for it. Then, that being so, of course it follows that there is no defence at all, and this is my opinion.

(5) 2 Bing. N.C. 761; 5 Law J. Rep, C.P. 286.

This, however, is not the ground on which the Court of Appeal decided. They thought that there was shewn to be a custom or course of dealing which rendered Drake & Co.'s conduct a literal fulfilment of the contract. I am not satisfied that on the evidence such a custom or course of trade is shewn. I do not say it is not, but I would at least wish to hear the respondent's counsel before deciding on that ground. On the other, as I have already intimated, I have no doubt at all.

LORD WATSON.—I concur in the judgments delivered, and have nothing to add.

LORD FITZGERALD.—I also concur.

Order appealed from affirmed, and appeal dismissed, with costs.

Solicitors—Waltons, Bubb & Johnson, for appellant Inglis; Hollams, Son & Coward, for respondent Stock.

1884. Dec. 19. } BOLLEN (*appellant*) *v.* SOUTHALL (*respondent*).

Parliament — Registration — Notice of Objection—Specification of List and Division to which Objection refers—Parliamentary and Municipal Registration Act, 1878 (41 & 42 *Vict. c.* 26), *s.* 28, *sub-s.* 2—*Schedule Form I., Nos.* 1 *and* 2—*Amendment.*

In the township of B., in the borough of W., there were three lists of Parliamentary voters—namely, freemen, occupiers, and lodgers. The occupiers list was the only one of these made out in divisions, being in accordance with section 15 *of the* 41 & 42 *Vict. c.* 26.

Notice of objection was given to the overseers in these terms:—"I hereby give you notice that I object to the names of the persons mentioned below being retained in the B. list of persons Division I. entitled to vote at the election of a member to serve in Parliament for the borough of W." :—

Held, *that such notice, if not in form an accurate compliance with the Form* (*I.*), *No.* 1, *in the schedule to* 41 & 42 *Vict. c.* 26,

was such a notice and gave such information as was contemplated by the Act. The informality and inaccuracy were at any rate to be treated as a mistake, and within the powers of amendment conferred on the Revising Barrister under section 28, *sub-section* 2, *of the same Act.*

This was an appeal against the decision of the Revising Barrister for Worcester, who stated the following Case :—

William Thomas Harris, of 24 George Street, in the city of Worcester, on the list of Parliamentary voters Division I. for the parish of St. Martin, objected to the names of Walter Bollen and others being retained on the Blockhouse list of persons (Division I.) entitled to vote at the election of members to serve in Parliament.

The notice of objection given by Harris to the overseers was as follows :—

"To the overseers of the parish (township) of the Blockhouse,—

"I hereby give you notice that I object to the names of each and every person mentioned and described below being retained in the Blockhouse list of persons Division I. entitled to vote at the election of a member (or members) to serve in Parliament for the Parliamentary borough of Worcester.

"Dated this 22nd day of August, 1884.

"Signed—William Thomas Harris, of 24 George Street, Worcester, on the list of Parliamentary voters Division I. for the parish of St. Martin."

Ninety-seven other persons whose names were set out in an appendix annexed to the Case were also objected to by Harris. (Here followed the names, abode, nature of qualification, and street where the property was situated of Bollen and the others.) There are three lists of Parliamentary voters for the Blockhouse, namely, 1. Householders and occupiers; 2. Freemen; 3. Lodgers. The name of Walter Bollen was on the Parliamentary list Division I. for the Blockhouse.

It was contended on behalf of Walter Bollen that the notice of objection given to the overseers was insufficient, inasmuch as the notice did not specify the list of Parliamentary voters to which the objection referred, as required by the note to the form of notice of objection given in the schedule of 41 & 42 Vict. c. 26. It was further contended on behalf of Walter Bollen that the Revising Barrister had no power to amend the notice of objection. It was contended on behalf of Harris, the objector, that the omission did not invalidate the notice of objection.

The Revising Barrister decided that the notice of objection in the case of Walter Bollen, and the notices of objection in the cases of the other persons named in the schedule to the Case, ought to have specified the list to which the objection referred, and by reason of the omission were invalid.

The Revising Barrister was then asked, on behalf of Harris, to amend the notices of objection under section 28, sub-section 2, of the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), by supplying the omission, which omission, it was contended, was a "mistake" within the meaning of that sub-section, and that the Revising Barrister could and ought to correct such mistake.

The Revising Barrister decided that he had power to amend the notice, and did amend it accordingly, by supplying the omission, and expunged the name of Walter Bollen and the names of the other persons mentioned in the schedule.

If the Court should be of opinion that the Revising Barrister had no power to amend the notice of objection, the register for the city of Worcester was to be amended by inserting therein the names of Walter Bollen and the ninety-seven persons named in the schedule.

Willis Bund, for the appellant.—The notice of objection is bad. This point was practically decided in *Hall* v. *Cropper* (1). The voter is entitled to have specific notice, and this does not specify the list.

[CAVE, J.—It is not stated here that the overseers were misled.]

But this being an omission, there is no power of amendment; it is not the amending of a mistake within sub-section 2 of section 28. There is no information given as to what qualification is objected to. The judgment of Lindley, J., in *James* v.

(1) 49 Law J. Rep. C.P. 160.

Howarth (2) is against the power of amendment here exercised.

[LORD COLERIDGE, C.J.—We there decided that as the information to the person objected to had been conveyed to him, there was a power of amendment.]

But it is submitted that what can be supplied in the case of an objector cannot be supplied in the case of the person objected to. Where the notice is originally bad in law, it cannot be turned into a good notice.

R. S. Wright, contra.—In substance this notice contains a description of the list which is unmistakable. Division I. can only exist in one list—that of householders and occupiers. But, if not good as it stands, the notice could be amended. In *James* v. *Howarth* (2) Lord Coleridge, C.J., thought that there was a power of amendment under sub-section 2 of section 28.

No one here could have been misled; and it is not necessary for there to be any finding in fact that no one was misled, when the matter is so plain. *Adams* v. *Bostock* (3) is very similar; the omission of place of abode was there held to be a mistake amendable.

Willis Bund, in reply.—Not only the person objected to, but the overseers, ought to have a specific description of the list on which the name of the person objected to is to be found.

LORD COLERIDGE, C.J.—I think that this notice was informal; but it was in substance such as was intended by the Act. It gives the information required to be given, and does not, in my opinion, withhold any which either is necessary to prevent the voter being misled, or is in terms required. It specifies that the objection is to Division I., and as only one of the three lists has divisions in it, the information as to which list objection is made is practically furnished. It is true that by section 8 of 41 & 42 Vict. c. 26 the notices are to be in the forms provided in the schedule, and so it has been held that the forms are not directory only, but must be complied with.

Then there is a power of amendment given of any mistake proved to the Revising Barrister to have been made in any notice of objection. That power I am very much disinclined to extend; but it would be cut down to nothing if, when all the information required has been furnished by the objector, the Revising Barrister could not amend the form in which such information is given. I therefore think that this was well within his power to amend; and I would only say that, in these cases of non-compliance with prescribed forms, I should hold the person strictly to the letter within reasonable limits, as it is all-important that nothing in the way of laxity of practice should be encouraged. Were it otherwise, when feelings are strongly enlisted and partisan spirit aroused, agents might be tempted to take advantage of the facilities afforded by amendments to mislead, and so work injustice. I think, in the case before us, that the power of amendment was rightly exercised, and this appeal must be dismissed.

STEPHEN, J.—I am of the same opinion. I felt great doubt until Mr. Wright made it clear that, substantially, all requisite information was given by this notice, and the list sufficiently identified. I quite agree also as to the necessity for not relaxing to any extent the rule of insisting on strict compliance with the different forms prescribed by the Act. It is most necessary to prevent injustice, as party agents are up to all points by which advantage may be gained for their respective sides.

CAVE, J.—I also am of the same opinion. With reference to the interpretation of subsection 2 of section 28, I desire to reserve liberty of action in future; but, as it gives some discretion to the Revising Barrister to amend, I am clearly of opinion that he ought in this case to exercise it by amending, as the power given by the section must be wider than that contended for by Mr. Willis Bund, and must certainly include this notice.

Appeal dismissed, with costs.

Solicitors—W. H. Stallard, agent for T. Stallard, Worcester, for appellant; Church, Rendell & Co., agents for S. Southall, Town Clerk, Worcester, for respondent.

(2) 49 Law J. Rep. C.P. 169.
(3) 51 Law J. Rep. Q.B. 175.

[IN THE COURT OF APPEAL.]

1885. } TATE AND SONS *v.*
June 9, 11, 12. } HYSLOP.*

Ship and Shipping—Marine Insurance—Risk of Lighterage — Concealment of Arrangement between Assured and Lighterman.

The plaintiffs effected with an underwriter policies of marine insurance on sugar on board certain steamers. The policies included all risks of transhipment of raft, craft, and lighters in loading and unloading. The sugar was lost while on lighters. The plaintiffs had an arrangement with the lighterman that he should do all their lighterage on the terms that he was not to be liable for loss unless caused by negligence. The existence of this arrangement was not communicated to the underwriter. The plaintiffs knew that since some lightermen had thus limited their liability for loss, underwriters had charged higher rates of premium in cases in which the liability was so limited than in other cases. In an action on the policies of insurance, the jury found that the fact of the plaintiffs having such an arrangement with the lighterman was a fact which a prudent underwriter would take into consideration in estimating the premium:—Held, *that there was evidence to justify the finding of the jury, and therefore that the defendant was entitled to judgment on the ground of the non-disclosure by the assured of a material fact.*

Appeal by the plaintiffs from the judgment of the Queen's Bench Division entering judgment for the defendant.

The plaintiffs sued on four open policies of marine insurance which they had effected with the defendant. Each policy was on sugar or merchandise, as interest might be declared, in steamer or steamers, and in "boats and lighters, while loading and unloading, and until finally delivered at any wharves, docks, landing-places, vessels, or refinery at Silvertown, as ordered by the assured."

The risks included were "all risks of transhipment and storage on the route, and of raft, craft, and lighters in loading and unloading and transhipment, and particularly of any special lighterage, and while in craft waiting shipment or landing or delivery to other vessels after arrival, and until delivered at any wharves, docks, landing-places, vessels, or elsewhere, as ordered by the assured or their agents, each craft, lighter, or other craft to be considered as separately insured."

The sugar was lost while it was on lighters in the Thames on its way from the steamer in which it had been carried.

The defence, in so far as it was material to the appeal, was that the plaintiffs had concealed certain material facts known to them but unknown to the defendant. The defendant also alleged that the plaintiffs had made a misrepresentation in stating that there would be a recourse against the lighterman should the goods be damaged while on lighters. The alleged concealment was that the plaintiffs had arranged with their lighterman that he should do all their lighterage on the terms that he should not be liable for any loss except loss caused by his own negligence, and that they had not communicated this fact to the defendant.

It appeared at the trial that before April, 1882, underwriters who had insured goods by policies similar to those now sued on, used, in case of loss of the goods while on lighters, to sue the lightermen in the name of the assured, and thus recover back what they, as insurers, had had to pay. But in April, 1882, the Thames masterlightermen published a notice stating that they would not take the responsibility of common carriers, and would only be liable for loss or damage to goods caused by the negligence or wilful acts of their servants. On this the underwriters at Lloyd's resolved in May, 1882, that "it would be injurious to mercantile interests to limit the customary liability of lightermen," and they published a letter calling attention to the proposal of the lightermen, and stating that underwriters were entitled to be informed as to the nature of the lighterage risk to be incurred by them. It appeared that after this the premiums on policies such as these differed, the rates being higher in cases in which there was a limitation of the liability of lightermen than in cases in

* *Coram* Brett, M.R., Baggallay, L.J., and Bowen, L.J.

which there was the former full recourse against lightermen. The plaintiffs knew this, having been informed of it by a letter from their brokers.

The plaintiffs had arranged in 1879 with a lighterman named Hooper to do all their lighterage for them, on the terms that he was only to be liable for losses arising from his own negligence.

The plaintiffs effected these policies without paying any additional premium for craft risk, nor did they inform the underwriter of their arrangement with Hooper. It was contended that the defendant had, in fact, notice of this arrangement, since, in an action brought by his solicitors on behalf of the defendant and other underwriters against Hooper in respect of a loss of the cargo of another vessel which had been insured by the defendant under a similar policy, the solicitors had notice of this arrangement, for it had formed Hooper's defence to that action. The defendant, however, stated that he had no knowledge of its existence till after the insurance had been effected.

The following questions were left to the jury, who returned the answers set out after each question:—

1. Was the fact communicated to the underwriter that, by the existing arrangement between Hooper and the plaintiffs, Hooper was liable only in case of negligence?—Answer: It was not communicated direct to the underwriter, but it was disclosed to the defendant's solicitors on the 5th of August.

2. Was the fact of the plaintiffs having that arrangement with Hooper material to the risk—that is to say, was it a fact which a prudent and experienced underwriter would have taken into consideration in estimating the premium?—Answer: Yes.

3. If it was material, was it concealed?—Answer: No.

4. When the insurances were effected on the 21st and 25th of July, and on the 5th and 23rd of September, was it the usual usage for merchants to employ lightermen on the terms of the resolution of the Association of Lightermen in April, 1882?—Answer: Yes.

5. Was that usage generally known?—Answer: Yes.

6. Were the underwriters reasonably justified under the circumstances of the case in assuming, without enquiry, that there would be recourse against lightermen with the liability of a common carrier?—Answer: No, they were not.

The learned Judge entered judgment for the plaintiffs.

The Queen's Bench Division set aside this judgment, and the plaintiffs appealed.

Webster, Q.C., Reid, Q.C., and *Hollams*, for the appellants.—On the findings of the jury the plaintiffs are entitled to judgment, for they did not conceal from the defendant anything which it was their duty to disclose to him. If the arrangement as to lighterage was not disclosed, still that fact does not invalidate these policies, for it was not material in the sense that it need be disclosed. If there are several alternative methods of landing goods, then the underwriters are not entitled to assume that one method will be always adopted to the exclusion of the others.

Vallance v. *Dewar* (1) and *Tennant* v. *Henderson* (2) were referred to.

Russell, Q.C., Cohen, Q.C., and *Barnes*, for the defendant.—The jury have found that a particular fact was not communicated directly to the underwriter, and this finding establishes the defence, for it asserts that there was that which in law amounts to concealment and misrepresentation. There was no disclosure which can affect the defendant with knowledge of the arrangement, and it is for the plaintiffs to establish that they were excused from communicating to the defendant the arrangement as to lighterage. It is not contended that the plaintiffs warrant that the lightermen are common carriers; but if an assured has a standing arrangement with a lighterman which prevents there being any recourse to the lighterman, then that is a material fact which the underwriter is entitled to know—for anything which will diminish the loss is a material fact. It is enough if it would, in fact, influence the mind of a reasonable man and have an effect on his deciding whether to accept or decline the risk.

(1) 1 Campb. 503.
(2) 1 Dow, 324.

Tate v. *Hyslop, App.*

Harrower v. *Hutchinson* (3), *Ionides* v. *Pender* (4), *Rivaz* v. *Gerussi* (5), and *Bates* v. *Hewitt* (6) were cited.

Webster, Q.C., in reply.—There is no evidence that the underwriter considered this material, or that he had different rates of premium, or that, if he had, that the plaintiffs were aware of it. The question in *Harrower* v. *Hutchinson* (3) was whether the party had been misled; and *Rivaz* v. *Gerussi* (5) was a case of fraud.

BRETT, M.R.—In this case the plaintiffs had effected a policy with the defendant and others upon goods shipped to England. The policy was to include all risks incidental to sea navigation, and all risks "of raft, craft, and lighters in loading and unloading and transhipment, and particularly of any special lighterage, and while in craft waiting shipment or landing or delivery to other vessels after arrival, and until delivered at any wharves, docks, landing-places, or elsewhere, as ordered by the assured." The goods arrived in the Thames in a ship, and were put on board a lighter, which belonged to a man whose business it was to let lighters. He had a running agreement with the plaintiffs, as to the construction of which there has been some contention, but which was one of two things. It was either an agreement which, as between the plaintiffs and Hooper, obliged the plaintiffs at the risk of breach of contract to allow him to carry all goods which were brought for them in ships and were to be taken to a wharf; or it was an agreement whereby whenever Hooper should lighter goods for the plaintiffs certain conditions should be part of the contract. In either case it was part of the contract that Hooper should only be liable to the plaintiffs in the case of negligence—that is, that whatever may be the liability of a lighterman, whether he is to be considered as a common carrier, or whether because he carries goods in a vessel upon the water while doing so he has the same liability as to loss as a common carrier, in this case he should only have the liability as limited by the agreement. The loss is admitted, and the plaintiffs are entitled to recover under the policy, unless they have disentitled themselves to sue and recover upon the policy. The defence is that of concealment of a material fact. Concealments are of two kinds—namely, fraudulent concealment or non-disclosure. Here it is charged against the plaintiffs that, from ignorance of what was necessary for them to do under the law, or from carelessness, they did not disclose to the underwriter that which they ought to have disclosed. The learned Judge who tried the case left to the jury certain questions, which have been answered specifically, and upon the answers so given he directed verdict and judgment to be entered for the plaintiffs. The Queen's Bench Division has entered verdict and judgment for the defendant, and the plaintiffs now appeal. The first finding is of no value. A solicitor is not a standing agent for his client to receive mercantile notices in respect of mercantile business. It may be doubted whether there was a disclosure on the 5th of August; but whether there was or was not is, as it seems to me, immaterial.

The substantial questions raised on the argument before us were, whether the jury were justified in answering the second finding in the affirmative; and, if they were, then whether they were justified in answering the fourth and fifth findings in the affirmative; and, further, that if this was right, then whether these findings materially affect the plaintiffs' case. I have come to the conclusion that the jury were justified in answering the second question as they did, and that the direction on that point was right. It is said that the plaintiffs should have disclosed that they had an arrangement with Hooper which minimised his liability in case of loss. The only effect which it was suggested that that could have upon the monetary position of the underwriter is that, assuming a loss for which he would be liable under the policy to pay the plaintiffs the sum assured, he would not by reason of this limitation of liability have the same valuable recourse over against the lighterman which he otherwise would have in the name of

(3) 39 Law J. Rep. Q.B. 229; Law Rep. 5 Q.B. 584.

(4) 43 Law J. Rep. Q.B. 227; Law Rep. 9 Q.B. 531.

(5) 50 Law J. Rep. Q.B. 176; Law Rep. 6 Q.B. D. 22.

(6) 36 Law J. Rep. Q.B. 282; Law Rep. 2 Q.B. 595.

the assured. It is obvious that that only affects the salvage which the underwriter might have; and if there were nothing else in the case, I should have been inclined to think that the mere diminution of the right to salvage would not have been a fact material to the risk. The question of what salvage can come to the underwriters is not material. It would have been a matter, I am inclined to think—but it is not necessary to decide the point—immaterial to what is called the risk, and therefore, to my mind, to the insurance. But something else has happened, and it seems to me that, it having become more or less publicly known that some lightermen at all events would not carry goods unless their liability was minimised by arrangement, a state of things might arise affecting the underwriter's right to salvage where there was a loss on board lighters. It is not contended but that upon such a policy as this the underwriter would be liable for loss whether the lighter belonged to the owner of the goods or to another person, or whatever was the arrangement for lighterage between the lighterman and the person for whom the goods are carried. Therefore it signifies not to whom the lighters belonged, for the underwriter would be in any case equally liable for loss on board the lighters. Two states of things in such a state of circumstances affect underwriters: first, whether the goods are on board a lighter in which the lighterman is liable to the full extent of the law; secondly, whether they are on board a lighter, to the lighterman of which the full liability does not attach. It was disputed whether, if the lighter belonged to wharfingers, they would have that liability in the absence of a special contract. To my mind they would. If goods are lost in the lighter of a dock company, the company are carriers of goods on the water, and therefore are subject to the full liability unless there is an arrangement which restricts that liability. Therefore underwriters, finding that in the one case they would have the advantage of using the name of the assured against the persons who were under full liability, and that in the other case there was an arrangement which diminished that recourse, came to the conclusion that the two positions were different, and that their mercantile interest was differently affected by them. For they considered that they ran greater risk of money loss in the one case than in the other. Upon that they came to the conclusion that in the one case they would charge a larger premium, while in the other, where they had full protection, they would charge less; and they came to the conclusion that they would have two rates of insurance. They made it known that such was their resolution, so as to let people know that if they insured with them they would have to pay different premiums answering to the different states of circumstances. There is evidence that this became known to the plaintiffs, either personally or by their brokers, before they insured. It seems to me that the moment they knew that there were these two rates of insurance, it did become material to the underwriters to know what was the plaintiffs' intention at the time; and if the plaintiffs had made a particular agreement as to risk, it became material for the underwriters to know that. Even if the plaintiffs were not bound to land all goods by means of the services of a particular lighterman, yet it seems to me that where the assured know that there is a difference in the premium, and where they have the intention at the time when they insure to land their goods in circumstances in which they know that if those circumstances were disclosed the underwriters would require a larger premium, and that if those circumstances were not disclosed they would charge a lower premium, it has by those circumstances become a matter which a prudent and experienced underwriter would take into consideration in estimating the premium and the risk, and therefore that it is a material fact. Therefore that question being rightly left to the jury, they were justified in coming to the conclusion which they did. The authorities shew that the materiality need not be one which is material to the risk of loss—that is, which enhances or diminishes the risk of loss—but the question is whether it will affect the mind of the underwriter who is considering whether he will undertake the insurance, or will influence him in fixing the terms upon which he will insure the goods.

The case of *Harrower* v. *Hutchinson* (3) comes the nearest to the present case. There the assured insured against loss upon a voyage goods which by the charter-party might be loaded at any port in a certain country or province. The state of things with regard to those ports was this: The port Laguna de los Padres was a port in the navigable sense, although at one time that was doubtful, and the majority of the Court of Exchequer Chamber held it was a port. It was a port in the province, and therefore it was a port within the policy. But it was not so frequented by merchants as to throw upon underwriters the knowledge of the condition of that port, or even that there was a port. An underwriter is bound to know the mercantile geography of the countries with regard to which he undertakes an insurance—that is, he is bound to have the knowledge which underwriters of ordinary skill have. But if there are any circumstances with regard to a port in a place which, although it exists as a port, is yet not so well known that all careful underwriters must be taken to know them, then with regard to those circumstances there is a case which may be brought within the definition which requires an assured to disclose more facts. As a fundamental rule an assured has to disclose any circumstance which would affect the determination of a prudent and experienced underwriter which is known to the assured and is not known and ought not to be known to the underwriter. In that case it was proved that the port existed, and that it was a more dangerous port than the other. But, by reason of it not having been sufficiently frequented, it was not to be assumed against any particular underwriter that he was bound to know, and it was proved that the particular underwriter did not know this fact. So that the case was one in which the assured knew of a danger which the underwriter did not know and was not bound to know; for that reason, therefore, the Court held that the assured ought to have disclosed the fact that he was sending the ship to that port, and that it was a more dangerous port than the other. The difficulty in that case was, whether the underwriter ought not to be taken to know the condition of that port, because it was a port in the province; but it was held that, in the particular circumstances of the case, the port not being so largely frequented as to make it known to the generality of careful underwriters, the particular underwriter was not bound to know it. Applying that doctrine here, the assured knew that they had made up their minds at the time of the insurance to land the goods by and through this particular lighterman. That was not disputed. It must be taken that the plaintiffs had made up their mind to land the goods by and through Hooper. They knew that they had a particular arrangement with him, and that if he did carry their goods he would be only under a limited liability. To my mind it is clear that the particular underwriter did not know of this arrangement. Therefore there is here a matter which the assured knew and the underwriter did not know. Then comes the question whether the underwriter ought to have known. The evidence as to this, on which the second finding is based, is that there was a diversity of practice, and that some goods are carried by lightermen with full liability, and others with limited liability, caused in some cases by agreement, and in others by circumstances. If the fourth finding means that it was the general practice—so general that almost every merchant employs a lighterman with limited liability—it seems to me to destroy and cut away the very ground on which the second finding was founded. It leaves only one mode of landing goods. Is it true to say that there is only one mode of landing—that is to say, under limited liability? It seems to me that, by the evidence on both sides, and by the cases pressed by counsel on both sides, it is not true to say that there was a general usage to employ lightermen only in one set of circumstances. The evidence shews nothing which can support and make reasonable that finding of the jury upon the fourth question. If the fourth falls, the fifth also falls. Therefore, so far as my judgment goes, I should say that the case must be decided on the footing that there was no evidence to support the findings in answer to the fourth and fifth questions.

The case rests upon the second finding. Having come to the conclusion that the second finding is right, it seems to me that the facts which support that make it impossible that the fourth and fifth can be right. It comes to this, that the fourth and fifth are inconsistent with the second; so that there is a dilemma that if findings four and five are right, the second is wrong, and if the second is right the others are wrong. I think that the fourth and fifth are wrong, and that the second is right. If the questions are understood in a limited sense, it seems to me that they would not be material findings. I do not think the sixth question affords us any assistance, or that it is relevant. I therefore come to the conclusion that the judgment of the Queen's Bench Division must be supported, and that the verdict must be entered for the defendant. I think that the meaning of the third answer is that the fact was not disclosed; I do not think it was concealed in any other sense than this, for there is no symptom of fraudulent concealment.

BAGGALLAY, L.J.—I am of the same opinion. The ground of my judgment is that there was evidence upon which the jury could reasonably come to the second finding, but there was no evidence to support the third, fourth, and fifth findings.

BOWEN, L.J.—I am of the same opinion. The first question is as to what is the legal test to be applied to the evidence. It is established law that a person who deals with underwriters must disclose to them all material facts known to himself and not known to them, or, at all events, all of such unknown facts as they are not bound to know. In order to make that proposition clear, of course it becomes necessary to understand what is meant by a material fact. It is plain that it is the duty of the assured to communicate to the underwriter all facts in his own knowledge which would affect the mind of the underwriter either as to taking the contract or as to the premium. The question of materiality depends upon the effect the communication would have upon the underwriter at the time when the policy is made. Therefore, in answering the question whether a fact is material, one may shortly dispose of it by saying it depends upon whether or no a prudent underwriter would take the fact into consideration in estimating the premium and the risk.

The law has been well established in *Ionides* v. *Pender* (4) and other cases, and it is now necessary to see what are the facts to which we have to apply it. The importers of this produce which is to be landed in the Thames use lighters for the purpose of discharging the cargoes. Down to 1882 there seems to have been no importance universally attached by underwriters to the way in which importers dealt with lightermen. Owing to certain previous litigation the lightermen came together in 1882, and combined for the purpose of insisting upon being discharged from the liability known as that of common carriers. Their combination became known to merchants and underwriters, who took a very serious view of the matter, and thought the determination of lightermen to resist the liability of common carriers was of sufficient gravity to affect the policies which they underwrote and the premium they charged. As long as in these circumstances it remained uncertain, down to the time when the ship arrived, how the cargo would be dealt with—whether it would be landed by the intervention of a lighterman who remained subject to a common law liability, or by one who took the goods upon the terms of being exempted—then, unless the underwriters made it part of the terms of the bargain between them and the assured and insisted that the goods should be landed one way or the other, the transaction was not impeachable, for there was nothing which the assured in such a case knew and the underwriters did not know, therefore there could be nothing which the assured was bound to disclose, the non-disclosure of which was material, because the underwriters would be bound to know the ordinary course of trade. But the moment the merchant makes an arrangement which determines the uncertainty in one direction, and binds himself by agreement (as seems to have been the case here) with a lighterman to allow him to carry the goods without being liable to the common law liability, then the case is

altered. Or even supposing the merchant does not bind himself by a binding agreement to employ a lighterman, and that the arrangement in this case falls short of a mutual contract—still it amounts to this: that he has made an arrangement which for business purposes practically governs the future, an arrangement which exists at the time when he makes the policy, and one which he intends to carry out; so that a fact exists which is in the knowledge of the assured and not in the knowledge of the underwriter. Is it material that that should be disclosed? The evidence here was that from and after May, 1882, premiums were affected by the existence or non-existence of such an arrangement; and if one wishes for a conclusive fact upon the question whether this arrangement and intention on the part of the merchant was material, one finds it in the broker's letter, which gave a clear indication to his principal that in his mind, as well as in the mind of the underwriters, such an arrangement ought to be disclosed. It is impossible in such circumstances, having regard to the true definition of materiality, to doubt that the finding of the jury must stand which says that the fact of the arrangement having been made by the principals was material to the risk—that is, was a fact which a prudent underwriter would have taken into consideration in estimating the premium. With regard to the question whether the mere existence of facts which would lessen the salvage are facts which should be disclosed, I offer no opinion. It seems to me that although an arrangement which diminishes salvage is not necessarily material, it may be so, and that the real test is whether the underwriter is affected as to the policy or premium. But it is unnecessary to decide that. Nor is the arrangement here between the merchants and the underwriters a mere lessening of salvage, for here the existence of such an arrangement may increase the danger of the goods being lost. But, whatever may be the real law as to that, I found my judgment upon the fact that at the time of the policy there was a business arrangement existing between the assured and the lighterman which was intended by the assured to be acted upon, which, moreover, would, in the opinion of the jury, materially affect the mind of the underwriter in respect of the premium he demanded. If that is a true view of the case, the remaining answers to the questions seem to me to be embarrassing. The fourth may be read in two ways. If it is read in one way it will mean that practically there was but one mode of landing goods, and that the general usage was to employ lightermen upon the terms that they should be discharged from common law liability. It seems to me that that is inconsistent with the answer given to question 2, and that there is no evidence to support it. It cannot be said that there is evidence by which such a universal practice can be found by the jury to exist. I confess that I am inclined to read the fourth answer as intimating an opinion on the part of the jury that there was a general usage, not supplanting other usages, but taking its place amongst them as one quite common and which should be known to all in business—a usage that lightermen might be employed upon the terms that the common law liability should remain, but that they might equally well be employed on the terms that the common law liability should not exist. If that is the true meaning, the answer to the question is irrelevant, because what is material is the existence of the prior agreement, and that is the fact as to which there has been concealment. It is within the right of the merchant to employ a lighterman upon any terms; but if there is a fixed agreement at the time of the policy, that should be disclosed. If that ought to be disclosed, how can it be an answer to say that the underwriters ought not to assume that there would be recourse against the lighterman, or that there was a general usage when the goods did arrive to deal with them in one way or the other? The complaint is, not that that recourse has been taken away in the events which happened, but that the underwriters were not told of the special agreement at the time when the policy was made. Therefore, if the fourth answer be read in that way, it is not an answer to the second finding of the jury. But if it is to be read, as pointed out by the Master of the Rolls, as an assertion that practically after one

date there was only one prevalent way of landing goods, there is no evidence upon which that can be found. The same observations apply to findings 5 and 6. I am, therefore, of opinion that the appeal should be dismissed.

Appeal dismissed.

Solicitors—Hollams, Son & Coward, for appellants; Waltons, Bubb & Johnson, for respondent.

1885. July 1. THE GREAT WESTERN RAILWAY COMPANY *v.* BAGGE AND ANOTHER.

Carrier—Consignment Note—Construction of—Statement that "Consignee pays Carriage"—Implied Liability of Consignor on Refusal of Consignee.

Where a consignor delivers goods to a railway company, to be carried under a consignment note which states that the carriage is to be paid by the consignee, he may nevertheless be sued by the railway company for the carriage if the consignee refuse to pay it: the true construction of the contract being that the consignor, while stating that as between the consignee and himself the former is to pay the carriage, undertakes, upon the carriers performing their agreement in carrying the goods to their destination, to be answerable for the freight if it is not paid by the consignee.

This was an appeal by Special Case in an action tried in the County Court of Newbury, in which the Great Western Railway Company sought to recover from the defendants, the consignors of a boiler trolley, the sum of 10*l.* 6*s.* 6*d.*, the amount of carriage from Bristol to Maidstone.

The consignment note was in these terms:—

"G. W. Ry.

"Consignment note. Bristol Station.

"The G. W. R. Co. are requested to receive and forward, as per address and particulars on this note, the under-mentioned goods, on the conditions stated on the other side.

"Signature of sender or his representative, Pickford & Co."

Owner and No. of wagon	Date of invoice	To what station to be sent	Consignee		No. and description of goods	Weight	Charges paid on	Who pays carriage
			Name	Address		tons cwt.	£ s. d.	
		Maidstone	J. Ellis & Co.		1 Boiler trolley	3 6	1 5 0	Consignee

Note.—Goods which may be required "to wait order" at any particular station, must be consigned on this note.

Messrs. Pickford signed the note on behalf of the consignors, the defendants. Evidence was given that the margin at the right-hand side of the consignment note was placed there for the purpose of instructing the company from whom they were to collect the carriage.

Ellis & Co., the consignees, refused to pay the carriage, because they had agreed with the defendants that the latter should pay it.

The defendants disputed payment upon the ground that there was no privity of contract between them and the Great Western Railway Company.

After the dispute arose, the defendants wrote the following letter:—

"March 6, 1885.

"To the G. W. R. Co.

"We admit that a contract existed between Messrs. Ellis & Co. and ourselves that we were to pay carriage of boiler trolley both ways, and we also admit that the same was duly carried, but we do not admit our personal liability to the G. W. R. Co., considering that we admit the consignment note of Messrs. Pickford & Co., Bristol, copy of which we have this day compared with Mr. Parks and found

correct, in which it states that consignee has carriage to pay.

"F. H. Bagge & Co."

It was contended on behalf of the Great Western Railway Company that notwithstanding the fact that it was an instruction to the Great Western Railway Company to collect the carriage from the consignee, and notwithstanding the fact that the railway company had failed to collect the money from the consignee, the senders were liable to the company, because it was with the senders that the contract was made; also that there was no privity of contract between the company and the consignee. It was also urged that the senders had admitted their liability by the letter written and set out above.

The learned Judge of the County Court held that there was no contract between the plaintiffs and defendants, and that the consignors were the agents for the consignees.

McCullagh, for the plaintiffs.—There was a contract between the consignor and the railway company. He was the only person they really knew in the transaction; and although they might be willing to receive payment from the consignee, yet he would merely be agent of the consignor in paying. The company are not bound by the statement on the consignment note as to who is to pay the carriage. That is only as between consignor and consignee, and does not preclude the carrier from recovering from the person who gave him the goods to carry and signed the note as sender. Really there is no privity between the consignee and the company; their only contract is with the defendants.

Spokes, *contra*, for the defendants.—The plaintiffs by accepting the goods on the terms of the note agreed that the consignors were only agents for the consignees. They cannot afterwards turn round and charge the consignors personally: there being no contract between them for payment of carriage. He cited *Dawes* v. *Peck* (1), *The Cork Distilleries Company* v. *The Great South and Western Railway Company* (2), *Drew* v. *Bird* (3), and *Davis* v. *James* (4).

LORD COLERIDGE, C.J.—I think that this case turns entirely on the meaning of the contract that was entered into by the Great Western Railway Company with Pickford & Co. Now the latter were acting as agents for the defendants, and as such they brought the goods to the railway company with a request to them to forward them as *per* address and particulars on the consignment note, which I have before me. It must be taken as if under these circumstances the railway company had received the goods from the defendants themselves. It is true that there is a statement on the consignment note that the consignee is to pay the carriage; but I think that the effect of the contract appearing on the note is this: the defendants say to the company—We want to send these goods to the consignee, will you forward them for us;—as between the consignee and ourselves he has to pay the carriage; but if he does not, of course we will pay you on your performing the work we ask you to undertake in carrying the goods to their destination. If that be the true meaning, as I think it is, these general presumptions and rules of law have no application. In every case it must be a matter of the construction of the particular contract, and I think that this contract was wrongly construed by the County Court Judge, and that there was here a clear contract between the defendants and the plaintiffs to pay the carriage. The cases cited do not seem very closely in point, though I may observe that in the judgment of Mr. Justice Lawrence (1), which was relied upon, that learned Judge is careful to point out that it is a question of the circumstances; and so, too, Lord Mansfield says, on the true construction of the contract he was dealing with (4), the consignor must pay. No doubt, where there is nothing to shew that the consignor is liable by the words of the contract, the general rule may be to make the consignee liable. That is not the case here, and for the reason I have given the judgment must be reversed.

MATHEW, J.—I am of the same opinion.

(1) 8 Term Rep. 330.

(2) Law Rep. E. & Ir. App. 269.

(3) 1 Moo. & M. 156.

(4) 5 Burr. 2680.

The argument of Mr. Spokes for the defendants comes to this, that the railway company ought to have inferred from the form of this consignment note that the consignors were the agents of the consignees. It would be very awkward if such was the necessary inference of law, because in fact they were not so; and had the railway company been induced to act on such an impression the consignors might be held liable for the fraud so perpetrated.

It is perfectly clear from the facts in evidence in the County Court that the Judge ought to have drawn the inference of a contract between the sender and the carrier, and there is, in my opinion, no ground whatever for suggesting that the railway company concluded a contract with any one else. The freight must therefore be paid by the defendants, the consignors, and the judgment given in their favour must be reversed.

Judgment for plaintiffs.

Solicitors—John White, for plaintiffs; Radford & Frankland, agents for C. Lucas, Newbury, for defendants.

1885. June 29, 30. THE VESTRY OF ST. JOHN'S, HAMPSTEAD, (*appellants*) *v.* HOOPEL (*respondent*).

Metropolis Local Management Acts, 1855 *and* 1862 (18 *&* 19 *Vict. c.* 120. *s.* 78, *and* 25 *&* 26 *Vict. c.* 102. *s.* 112)—*Private Drains, connection of, with Sewers—Right of Vestry to connect House Drains with Sewer.*

[For the report of the above case, see 54 Law J. Rep. M.C. 147.]

BANKRUPTCY. 1885. March 25. *In re* JENKINSON; *ex parte* THE NOTTINGHAM AND NOTTINGHAMSHIRE BANK.

Bankruptcy — Reputed Ownership — Goods in the Possession, Order, or Disposition of the Bankrupt in his Trade or Business—Bankruptcy Act, 1883, *s.* 44.

The words "goods in the possession, order, or disposition of the bankrupt in his trade or business" in section 44 *of the Bankruptcy Act*, 1883, *do not extend to property unconnected with a bankrupt's trade, although mortgaged by him to secure his trade account with his bankers.*

Appeal from an order of the Judge of the County Court of Lincoln, whereby it was ordered that the certificates of thirty shares in the Lincoln Wagon Company, in the possession of the appellants, the Nottingham and Nottinghamshire Bank, should be delivered to the trustee of the bankrupt.

In February and October, 1878, Jenkinson deposited the certificates of these shares with the appellants to secure his overdrawn account. Notwithstanding the deposit, the shares continued to be registered in the name of Jenkinson only. On the 2nd of January, 1884, a receiving order was made against Jenkinson, and he was afterwards adjudicated bankrupt. He had up to the time of his bankruptcy carried on business as a stockbroker, silversmith, and watchmaker: and the order appealed from was made on the ground that the certificates were in the order and disposition of the bankrupt in his trade or business.

Bigham, Q.C., and *Yate Lee* appeared for the bank in support of the appeal.

Horton Smith, Q.C., and *Stanger*, for the trustee.

The arguments are set out and dealt with in the judgment.

Cur. adv. vult.

The judgment of the Court (Cave, J. and Wills, J.) was (on April 1) delivered by

CAVE, J.—[After stating the facts as above set out, his Lordship proceeded:] The reputed ownership clause (section 15) of the

Bankruptcy Act of 1869 embraced all goods in the possession, order, or disposition of the bankrupt being a trader. The clause of the present Act (46 & 47 Vict. c. 52. s. 44) is confined to all goods in the possession, order, or disposition of the bankrupt in his trade or business.

It was contended for the respondent that the language of these enactments is substantially the same; and in support of that argument the judgment of Vice-Chancellor Bacon in *The Colonial Bank* v. *Whinney* (1) was referred to. In that case the Vice-Chancellor is made to say that debts due to a man "as a trader" and debts due to him "in the course of his trade or business" are identically the same expressions. But it is hardly possible that he can have been correctly reported; for in both Acts the words of the proviso are the same, and the expression debts due to a man "as a trader" is not to be found in either section. The expression goods "in the possession of a bankrupt being a trader" and goods "in the possession of a bankrupt in his trade or business" can hardly be regarded as identical. If a wine-merchant carrying on business in the city lives, say, at Surbiton, the furniture in his house at Surbiton may be said to be in his possession being a trader; but it cannot be said, we think, that it is in his possession in his trade or business. So, if a silk-mercer in St. Paul's Churchyard were to keep a yacht for his amusement, it could hardly be said that it was in his possession in his trade as a silk-mercer.

We prefer to follow the language of Vice-Chancellor Bacon in *In re Pryce* (2). In that case the bankrupt, a merchant in Liverpool, had deposited with his stock-broker a debenture in a mining company as a security for a debt he owed to the broker; and it was argued that, because the bankrupt was a trader, the debenture (which was admitted to be a *chose in action*) was a debt due to him in the course of his trade. Speaking of that argument, the Vice-Chancellor said: "I am unable to follow it. The result of it would be that every investment made by a man engaged in trade would be a debt due to him in the course of his trade. The investment has nothing whatever to do with the bankrupt's trade. The transaction was a plain and ordinary one, about which there can be no doubt whatever that it was an investment made by lending the money to a company." If a debenture in a mining company in which a trader has invested his money, being a *chose in action*, is not a debt due to the trader in the course of his trade or business, it would seem to follow that a share in a waggon company in which a trader has invested his money, being a *chose in action*, is not in his possession in his trade or business.

It was further argued that, however this might be if the bankrupt had not mortgaged the shares at all, or had deposited them to secure a private debt, yet, as he deposited them with his bankers to secure his banking account, they became from that moment in his order and disposition in his trade or business. It was somewhat difficult to follow the argument, but it was to the following effect: The bankrupt wanted an advance for the purposes of his business, and he got an advance by depositing these shares with the bankers. The advance was used in his business; and these shares represented the advance; and therefore the shares were used in the business also. When this somewhat confused argument comes to be examined, it falls to pieces directly. The bankrupt had the shares, and parted with them to secure the advance; therefore, so far as he was concerned, the money advanced which he got represented the shares he parted with; and conversely to the bankers, the shares which they got from the bankrupt represented the money they had advanced to him: but why because the bankrupt got the money on the security of his shares to use in his business, therefore the shares which he parted with to get the money which he wanted to use in his business were themselves in his order and disposition in his business, passes comprehension. Let us take again the case of the silk-mercer who has a yacht for purposes of pleasure—if he mortgages the yacht to secure his banking account, but continues to sail about in it for his pleasure, does the yacht cease to be in his possession for purposes of pleasure and begin to be in his possession

(1) 51 Law Times, N.S. 354.
(2) Law Rep. 4 Ch. D. 685.

in his trade? So long as it is in his possession unmortgaged, no reputation of ownership arises; nor does any such reputation arise if he mortgages the yacht to secure a debt which is not a trade debt. But it is said that the moment he mortgages it to secure his trade account with his bankers this reputation of ownership arises —and arises, be it remembered, among people who are utterly ignorant of the mortgage: for, if they knew of the mortgage which is said to give rise to the reputation of ownership, it is clear that that reputation could never arise. If this argument is good for anything, the decision in *In re Pryce* (2) should have been the contrary way.

Lastly, it was said that there is a well known custom on the London Stock Exchange by which London brokers are compelled themselves to take up stock they have bought for their customers if the customer fails to find the money on the appointed day, and that in that case it is a very common thing for the broker to deposit the shares so taken up with bankers to secure an advance, and to redeem them again when the customer finds the money. Whatever may be the law as to shares so acquired and dealt with, the facts of this case are entirely inconsistent with the argument. It has first to be made out as a fact that the shares were in the bankrupt's possession in his trade or business, before the question of reputed ownership arises. In this case, the shares had in fact been registered in the bankrupt's name for six years, and were held by him simply as an investment, and not for the purpose of selling to his customers. The further question, therefore, whether the shares were in the bankrupt's reputed ownership, does not arise; for the necessary preliminary fact that they were in his possession in his trade or business does not exist.

In our judgment, the order appealed from was wrong, and the appeal must be allowed, and the order set aside with costs here and below. The trustee may recoup himself out of the estate.

Appeal allowed.

Solicitors—R. F. Watson, agents for Newton, Jones & Champion, East Retford, for appellants; Richard Smith & Wilmer, agents for Thos. Bescoby, East Retford, for trustee.

1885. June 10. } WAYE (*appellant*) *v.* THOMPSON (*respondent*).

Public Health Act, 1875 (38 & 39 *Vict.* c. 55), *ss.* 116 *and* 117—*Meat seized and condemned as unsound — Liability of Owner to Penalty—Evidence that Meat was wrongly condemned.*

[For the report of the above case, see 54 Law J. Rep. M.C. 140.]

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TO THE SUBJECTS OF THE CASES

IN

THE QUEEN'S BENCH DIVISION

OF

The High Court of Justice,

AND IN BANKRUPTCY.

AND ON APPEAL THEREFROM

IN THE

COURT OF APPEAL AND HOUSE OF LORDS.

LAW JOURNAL REPORTS, VOL. LIV.

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—— notice of. See PRACTICE.

Act of Bankruptcy—notice of. See BANKRUPTCY.

Administration. See BANKRUPTCY.

Advances. See WILL.

Affidavit. See BANKRUPTCY; PRACTICE.

Agent—commission. See STOPPAGE IN TRANSITU.

Agistment. See LANDLORD AND TENANT.

Agricultural Holdings Act. See LANDLORD AND TENANT.

Alimony. See BANKRUPTCY.

Allegiance. See ESTOPPEL.

Annuity—*rent-charge: release of part of land charged: Lord St. Leonards' act* (22 & 23 *Vict. c.* 35), *s.* 10]—Where, on the conveyance of land which is subject to a rent-charge, the land conveyed is released from the rent-charge, the previous purchaser of other part of the land charged, not having obtained a release of that part, but not having concurred in the release of the other part, is, by the effect of Lord St. Leonards' Act, s. 10, liable to pay to the holder of the rent-charge a part of the rent-charge proportionate to his share of the land charged. *Booth* v. *Smith* (App.), 119

—— See HUSBAND AND WIFE.

Anticipation—restraint on. See HUSBAND AND WIFE.

Appeal. See BANKRUPTCY NOTICE; PARLIAMENT; MUNICIPAL ELECTION; PRACTICE.

Appropriation. See BILL OF EXCHANGE.

Arbitration—*valuation: rule of court: "agreement or submission in writing": common law procedure act*, 1854 (17 & 18 *Vict. c.* 125), *s.* 17]—Where, by a written agreement of demise between landlord and tenant, the tenant, at the expiration of the tenancy, is to be paid the usual and customary valuation, the persons making the valuation to take into consideration the state, condition, and usage of the lands, and, if not left in a proper state, to deduct compensation for the landlord, and thereupon two valuers, appointed by the landlord and the tenant, nominate an umpire who makes an award, the agreement is not an "agreement or submission to arbitration in writing" within section 17 of the Common Law Procedure Act, 1854, and there is no foundation for a rule of Court. *In re Dawdy and Hartoup* (App.), 574

—— See ACTION; PRACTICE; PUBLIC HEALTH.

Arrest. See BANKRUPTCY.

Assessment Committee. See POOR.

Assignment. See BANKRUPTCY.

Assurance—life. See REVENUE.

Attachment of Debt. See CREDITOR AND DEBTOR.

Attorney—power of. See BANKRUPTCY.

Attorney-General. See CRIMINAL LAW; INFORMATION.

Award. See PRACTICE.

Bailiff. See COUNTY COURT; LANDLORD AND TENANT.

Baker or Seller of Bread. See BREAD.

Bankruptcy — *acceptances with cover: bankruptcy of acceptor and drawer: destination of the covering securities: rule in* Ex parte Waring]—Where several acceptances have been given under a letter of credit, and, on both drawer and acceptor becoming bankrupt, securities by way of cover are still unrealised in the hands of the acceptor which by the letter of credit and the course of dealing were specifically applicable to cover certain of the acceptances, the proceeds of the securities are, under the rule in *Ex parte Waring* (19 Ves. 345), applicable in payment of the holders of the acceptances to which they were so specifically applied, and not in payment rateably of the holders of all the acceptances. *Ex parte Dever; in re Suse and Sibeth* (App.), 390

The rule in *Ex parte Waring* is not excluded by the fact that the acceptor down to the time of his bankruptcy was entitled to realise the securities at discretion, crediting interest to his correspondent, so long as at the time of the bankruptcy they were not realised. Ibid.

Evidence that of two members of a firm abroad one was lunatic and out of the foreign jurisdiction, and that the estate of the firm was being administered in the bankruptcy of the other, admitted as proof of the bankruptcy of the firm. Ibid.

—— *acceptance: appropriation of remittances to meet acceptances: general course of business*]—T., a Swedish merchant, was in the habit of drawing accommodation bills upon N., who carried on business in London, and of sending remittances from time to time to N. in order to enable him to meet the bills when due. The remittances were carried by N. to the credit of a general account between himself and T., in which T. was credited with interest upon the balance due to him. One of the accommodation bills for 450*l.* was to fall due on the 21st of July, 1883; and on the 13th of July T. forwarded to N. a draft at sight for 450*l.*, with a letter, in which he said, referring to the draft, "which please encash to my credit." On the 17th of July, N. cashed the draft, and on the 20th he stopped payment, and T. had to pay the bill which fell due on the 21st:—*Held*, that, having regard to the general course of dealing between the parties, there had been no specific appropriation of the draft to meet the particular acceptance falling due on the 21st of July, and that, as the draft was no longer in specie at the date of the failure of N., T. was not entitled to payment of the 450*l.* from the trustee in N.'s liquidation, but only to prove for that amount. *Ex parte Broad; in re Neck* (App.), 79

In re The Gothenburg Commercial Company (29 W.R. 358) followed. Ibid.

—— *act of bankruptcy: statement by debtor of inability to pay debts in full: notice of suspension of payment: bankruptcy act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4. *sub-s.* 1 (*h*)]—A debtor, in conversation with one of his creditors who was deputed by the general body of creditors to meet him, stated that he was unable to pay his debts in full, and offered a composition of twenty per cent.:—*Held*, that this did not amount to a notice, within sub-

Bankruptcy (continued)—

section 1 (*h*) of section 4 of the Bankruptcy Act, 1883, that the debtor had suspended or was about to suspend payment of his debts, and was therefore not an act of bankruptcy. *Ex parte Oastler; in re Friedlander* (App.), 23

—— *adjudication against debtor: official receiver as trustee: power of, to sell property of debtor: bankruptcy act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 9, 10, 20, 54, 56, 66, *and* 70]—An official receiver who is by section 54 of the Bankruptcy Act, 1883, the trustee for the purposes of that Act until a trustee is appointed, has power, after an adjudication in bankruptcy has been made against a debtor, to exercise the powers given by section 56 to the trustee, so that he can sell the property of the bankrupt. *In re Parker; ex parte The Board of Trade* (App.), 372

—— *affidavit sworn abroad: consul: certificate of qualification of person administering oath: bankruptcy act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 135, *schedule I. rules* 5 *and* 14: *bankruptcy rules*, 1883, *rule* 50]—Where an affidavit to be used in a Bankruptcy Court is sworn abroad before a person of whose qualification to administer oaths in the country where he resides the Court takes judicial notice, a certificate by a British minister, or British consul, or by a notary public, that the person administering the oath is qualified to do so, is not necessary. *In re Magee; ex parte Magee*, 394

—— *bankruptcy act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 27 *and* 125: *bankruptcy rules, rule* 28: *person dying insolvent: administration in bankruptcy of estate: discovery: order for examination of debtor's widow*]—Where an order has been made for the administration of the estate of a deceased person according to the law of Bankruptcy under 46 & 47 Vict. c. 52. s. 125, the Court has no power, either under section 27 of that statute, or rule 58 (Bankruptcy Rules, 1883), to order the attendance of witnesses for examination for the purpose of discovery of the deceased's property. *In re Hewitt; ex parte Hewitt*, 402

—— *bankruptcy petition: act of bankruptcy: failure to comply with bankruptcy notice in respect of judgment debt: appeal from judgment pending: bankruptcy act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 7, *sub-s.* 4]—By s. 7, sub-s. 4, of the Bankruptcy Act, 1883, on a creditor's petition for a receiving order, when the act of bankruptcy relied on is non-compliance with a bankruptcy notice to pay a judgment debt, the Court may, if it thinks fit, stay or dismiss the petition on the ground that an appeal is pending from the judgment. *Ex parte Heyworth; in re Rhodes* (App.), 198

Where the Registrar has exercised his discretion by staying proceedings on a petition pending an appeal from the judgment on which it is founded, the Court of Appeal will not interfere unless it is very clear that such appeal is frivolous and not *bona fide*. Ibid.

—— *bankruptcy petition: power of attorney to sign on behalf of his principal: bankruptcy rules*, 1883, *rule* 125: *appendix, form* 10]—A bankruptcy petition, signed by an attorney on behalf of his principal, is sufficiently signed, provided that the power under which the attorney acts is wide enough to confer upon him the necessary authority. *Ex parte Wallace; in re Wallace* (App.), 293

A power "to commence and carry on, or to defend, at law or in equity, all actions, suits, or other proceedings in which I or my property may be in anywise concerned," was held to confer such authority. Ibid.

—— *composition: approval by the court: evidence: official receiver's report: bankruptcy act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 18 *and* 28]—The report of the official receiver made *prima facie* evidence in applications for the discharge of a bankrupt by section 28, sub-section 4, of the Bankruptcy Act, 1883, is also *prima facie* evidence in applications for the approval of a composition or scheme of arrangement under section 18, sub-section 6, whereon, "if any such facts are proved as would justify the Court in refusing the discharge, the Court may refuse to approve the composition." *In re Wallace; ex parte Creditors* (App.), 382

—— *contract: assignment of money to become due under contract: title of trustee: bankruptcy act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 43]—A trader, who had contracted to build a ship to be paid for by instalments, assigned for value part of the money to become due under the last instalment, and afterwards became bankrupt. The trustee completed the contract at an expenditure of a sum less than the amount of the instalment:—*Held*, that the assignment was valid against the trustee. *In re Toward & Co.; ex parte The Trustee*, 126

Ex parte Nichols; in re Jones (52 Law J. Rep. Chanc. 635) distinguished. Ibid.

—— *county court: jurisdiction of, in bankruptcy: action in high court against trustee of bankrupt: power of county court to restrain: bankruptcy act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 100 *and* 102: *right of solicitor to audience in high court in bankruptcy matters:* 46 & 47 *Vict. c.* 52. *s.* 151]—A County Court which has by the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 100, for the purposes of its bankruptcy jurisdiction, in addition to the ordinary powers of the Court, all the powers and jurisdiction of the High Court, and, by

Bankruptcy (continued)—

section 102, full power to decide all questions of priorities and all other questions which may arise in any cases of bankruptcy coming within the cognisance of the Court, does not thereby acquire and has not jurisdiction to restrain an action brought in the High Court against the trustee of a debtor adjudicated a bankrupt in the County Court:—*So held* by the Court of Appeal, reversing the decision of the Queen's Bench Division. *In re Barnett; ex parte Reynolds & Co.* (App.), 354

Solicitors have, by virtue of the reservation in the Bankruptcy Act, 1883, s. 151, right of audience in the High Court on appeals from the County Courts in bankruptcy:—*So held* by the Queen's Bench Division.. Ibid.

—— *discharge: application for: bankruptcy: facts requiring refusal or conditional order: retrospective operation: bankruptcy act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 28 (3): "*rash and hazardous speculations*"]—The acts and omissions of the bankrupt mentioned in section 28 (3) of the Bankruptcy Act, 1883, requiring an order for discharge to be refused, suspended, or conditionally granted, need not have happened after the Act came into operation. *In re Salaman; ex parte Salaman* (App.), 238

—— *discharge: contracting debt without reasonable ground of expectation of paying: bankruptcy act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 28, *sub-section* 3 (*c*)]—Bankrupts who had begun business without capital and with a mortgage on their premises, goodwill, and stock in trade, refused their discharge except on condition of judgment being entered against them for all their provable debts. *Ex parte White; in re White* (App.), 384

—— *disclaimer of onerous "property": trust property: bankruptcy act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 55, *sub-s.* 1, 44, *sub-s.* 1, *and* 168]—The power of the trustee under section 55 of the Bankruptcy Act, 1883, to disclaim onerous property is not confined to "property divisible amongst creditors." *In re Maughan; ex parte The Trustee*, 128

Therefore the trustee is not precluded from disclaiming property merely because the property is "held by the bankrupt upon trust for any other person." Ibid.

—— "*final judgment*": *judgment giving costs and ordering an enquiry as to damages: bankruptcy act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4 (*g*)]—An adjudication of costs to the plaintiff contained in a judgment ordering an injunction and an enquiry as to damages against the defendant is a "final judgment for any amount" which may be the foundation of a bankruptcy notice under the Bankruptcy Act, 1883, s. 4 (*g*). *In re Faithfull; ex parte Moore* (App.), 190

—— "*income*": *appropriation to trustee: prospective earnings of bankrupt: personal skill: bankruptcy act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 90]—Prospective income, to be earned solely by the personal skill of the bankrupt, of a precarious character and indefinite amount, is not "salary or income other than" that of an officer in the army, a civil servant, or Treasury pensioner, which may be ordered to be paid to the trustee under section 90 of the Bankruptcy Act, 1869. *In re Hutton; ex parte Benwell* (App.), 53

——*liquidation: removal of one of two trustees: jurisdiction: "cause shewn": bankruptcy act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 83]—Where more persons than one have been appointed to the office of trustee in a liquidation, the Court has power under s. 83, sub-s. 4, of the Bankruptcy Act, 1869, to remove one of them without removing all. *Ex parte Newitt; in re Mansell* (App.), 245

"Cause shewn" for the removal of a trustee within the meaning of the section does not necessarily amount to dishonesty; it is sufficient if the conduct of the trustee is, in the opinion of the Court, such as to render him unfit to remain a trustee, and on this point the Court of Appeal will, as a rule, trust to the discretion of the Registrar, he being in a better position to judge of the conduct of the trustee complained of. Ibid.

—— *mutual dealings: set-off: dealing after act of bankruptcy: bill of exchange: bankruptcy act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 38]—Where a creditor of a debtor, after the debtor's bankruptcy and with knowledge thereof, accepts a bill of exchange, of which the debtor is holder, the creditor cannot set off the debt due to him before the bankruptcy against the claim of the trustee upon the bill of exchange. *In re Gillespie & Co; ex parte Reid & Son*, 342

In re The Milan Tramways Company; ex parte Theys (53 Law J. Rep. Chanc. 1008; Law Rep. 25 Ch. D. 587) followed. Ibid.

Elliott v. *Turquand* (51 Law J. Rep. P.C. 1; Law Rep. 7 App. Cas. 79) distinguished. Ibid.

—— *partnership: retirement of partner: bankruptcy of continuing partners: proof by executors of retired partner in competition with creditors of old firm: claims of creditors barred by statute of limitations as against estate of retired partner: trust for payment of debts out of real estate: no real estate: real property limitation act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 10]—A retired member of a partnership is not precluded from proving in bankruptcy against the estate of the continuing partners in competition with creditors of the original firm, where the claims of such creditors as against the retired partner are barred by

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the Statute of Limitations. *In re J. G. & F. Hepburn; ex parte Smith*, 422

A trust in a will for the payment of debts out of real estate does not prevent the operation of the Statute of Limitations, if the testator in fact leaves no real estate to support the trust. Ibid.

—— *petitioning creditor: bare trustee: joinder of beneficiary: notice of judgment debt: amendment: bankruptcy act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* (*g*), *ss.* 5, 105, *sub-s.* 3: *bankruptcy rule* 263]—A petition presented under section 5 of the Bankruptcy Act, 1883, by a creditor, who is not the beneficial owner of the debt, on the strength of an act of bankruptcy committed under section 4, sub-s. (*g*), by non-compliance with notice of a judgment recovered by him, must include, as a petitioning creditor, the beneficial owner of the debt, although the bankruptcy notice need be in the name of the judgment creditor only. *In re Hastings; ex parte Dearle* (App.), 74

—— *practice: judgment summons before court not having bankruptcy jurisdiction: transfer to court having bankruptcy jurisdiction: notice to judgment debtor of application for receiving order: debtors act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 5: *bankruptcy act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 103, *sub-s.* 5: *additional bankruptcy rules, 4th of March*, 1885, *rule* 268 (1) (*a*)]—Where the Judge of a Court not having jurisdiction in bankruptcy, to whom an application to commit a judgment debtor is made under section 5 of the Debtors Act, 1869, transfers the matter in pursuance of rule 268 (1) (*a*) of the Additional Bankruptcy Rules of the 4th of March, 1885, to a Court having jurisdiction in bankruptcy, the functions of the latter Court as to making a receiving order against the judgment debtor are judicial and not ministerial merely. Notice, therefore, should be given to the judgment debtor of the hearing by the Court to which the matter is transferred of the application for a receiving order. *In re Andrews: ex parte The Debtor*, 572

—— *practice: public examination of debtor: solicitor: representative of creditor: authority in writing: bankruptcy act*, 1883, *s.* 17, *sub-s.* 4]—The Registrar of a County Court sitting in bankruptcy has power to refuse audience to a solicitor retained on behalf of a creditor to question a debtor at his public examination, if the solicitor does not, when requested so to do, produce an authority in writing; for such solicitor is the representative of the creditor within the meaning of the Bankruptcy Act, 1883, s. 17, sub-s. 4. *Reg.* v. *The Registrar of the Greenwich County Court* (App.), 392

—— *practice: proceedings pending at the time of the coming into force of the act of* 1883: *jurisdiction of registrars: validity of bankruptcy rules*, 1883, *rule* 264: 46 & 47 *Vict. c.* 52. *s.* 169]—The jurisdiction which registrars in bankruptcy had by delegation or otherwise under the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), is preserved by 46 & 47 Vict. c. 52. s. 169, sub-s. 3, in respect of proceedings pending when the latter Act came into operation on the 1st of January, 1884; and rule 264 of the Bankruptcy Rules, 1883, which provides for the exercise of their jurisdiction, is a valid rule, and is properly made pursuant to section 127 of the Bankruptcy Act of 1883. *In re Home; ex parte Edwards* (App.), 447

—— *proof: "future debt or liability": alimony: order for weekly payments: bankruptcy act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 37: *divorce act*, 1866 (29 & 30 *Vict. c.* 32), *s.* 1: *debtors act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 5]—A liability to pay alimony in weekly sums by an order made in divorce under section 1 of 29 & 30 Vict. c. 32, is not a "future debt or liability" provable in bankruptcy under the Bankruptcy Act, 1883, s. 37, sub-s. 3; and, notwithstanding the bankruptcy of the person liable, payment may be enforced as of a debt due in pursuance of an order of a competent Court under section 5 of the Debtors Act. *Linton* v. *Linton* (App.), 529

—— *proof: judgment debt: consideration for: power of court to enquire into*]—Where a proof in bankruptcy is founded on a judgment debt, *prima facie* the judgment must be considered as binding; but if a proper case is shewn, the Court will direct an enquiry into the consideration for the judgment debt. *Ex parte Revell; in re Tollemache* (*No.* 1) (App.), 89

The admission of a debt by a bankrupt in his statement of affairs is not such an admission against his own interest as to constitute, as against his creditors, evidence of the existence of the debt. Ibid.

—— *proof: judgment debt: prior act of bankruptcy: notice: onus of proof: bankruptcy act*, 1849 (12 & 13 *Vict. c.* 106), *s.* 165]—Where a creditor seeks to prove in a bankruptcy, under an enabling section of an Act of Parliament, notwithstanding the fact that a prior act of bankruptcy, upon which the adjudication was founded, has been committed by the bankrupt, the onus is upon the creditor to shew that he had no notice of such prior act of bankruptcy. *Ex parte Revell; in re Tollemache* (*No.* 2) (App.), 92

Ex parte Schulte; in re Matanlié (Law Rep. 9 Chanc. 409) followed. Ibid.

—— *proof: judgment debt: suspicious circumstances: onus of proof: mode of proving judgment*]—In bankruptcy, proof may be made

Bankruptcy (continued)—

on a judgment debt; but if there are suspicious circumstances about the judgment, the creditor must prove the consideration. *Ex parte Anderson; in re Tollemache* (App.), 383

Proof tendered long after the bankruptcy on a judgment recovered shortly after the bankrupt's majority on a bill of exchange, the record and bill of exchange being both lost, rejected. Ibid.

A judgment may be proved by a certified copy of an entry in the entry book of judgments of a superior Court. Ibid.

—— *proof of debt: judgment obtained after act of bankruptcy*]—Where the only evidence of a debt tendered for proof in bankruptcy is a judgment obtained after the act of bankruptcy, the proof cannot be allowed. *Ex parte Bonham; in re Tollemache* (App.), 388

—— *receiving order: arrest for non-payment of instalment under judgment summons: payment under protest of moneys of official receiver: county court rules, January*, 1884: *bankruptcy act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 9]—On the making of a receiving order, the right of a judgment creditor to arrest the debtor under a warrant of commitment made before the date of the receiving order is lost. *In re Ryley; ex parte the Official Receiver*, 420

—— *reputed ownership: goods in the possession, order, or disposition of the bankrupt in his trade or business: bankruptcy act*, 1883, *s.* 44]—The words "goods in the possession, order, or disposition of the bankrupt in his trade or business" in section 44 of the Bankruptcy Act, 1883, do not extend to property unconnected with a bankrupt's trade, although mortgaged by him to secure his trade account with his bankers. *In re Jenkinson; ex parte The Nottingham and Nottinghamshire Bank*, 601

—— *reputed ownership: separate property of wife in possession of husband: marriage settlement in foreign country*]—A domiciled Englishman married a Prussian subject in Prussia. Prior to the marriage the intending husband and wife entered into a contract according to Prussian law whereby she became entitled to certain articles as her separate property. No trustee was appointed, but by that law the administration of the separate property of the wife belonged to the husband. The husband became bankrupt in England at a time when some of the property comprised in the contract was in his possession:—*Held*, that the property was in the possession of the husband as trustee for the wife, and therefore it did not pass to the trustee in bankruptcy. *Ex parte Sibeth; in re Sibeth* (App.), 322

—— *settlement: transfer of shares to son: bankruptcy act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 47, *sub-ss.* 1 *and* 3]—The bankrupt, in 1880, handed to his son a sum of money to be invested in shares in a ship, which was so invested by the son. The shares were afterwards sold by the son for 450*l.*, which sum he handed over to his sister upon a sort of implied trust for the benefit of their father and mother:—*Held*, that handing the sum for investment was a conveyance or transfer of property within the meaning of 46 & 47 Vict. c. 52. s. 47, sub-s. 3. *In re Player; ex parte J. F. Harvey* (*No.* 1), 553

—— *settlement: advance to son to start a business: bankruptcy act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 47, *sub-ss.* 1 *and* 3]—The bankrupt, in or about 1882, more than two years before bankruptcy, advanced to his son E. O. Player the sum of 650*l.* to purchase building stock and set up in business. E. O. Player found 150*l.* for capital, and carried on the business, and at the date of the bankruptcy was possessed of stock and capital to the value of about 500*l.*:—*Held*, that this was not a voluntary settlement under section 47 as interpreted by sub-section 3 of that section. *In re Player; ex parte J. F. Harvey* (*No.* 2), 554

—— *taxation of costs: costs of taxation: solicitors act* (6 & 7 *Vict. c.* 73), *ss.* 37 *and* 39]—There is no practice in bankruptcy by which a creditor reducing the bill of the trustee's solicitor by more than one sixth is entitled to the costs of the taxation, and the Solicitors Act (6 & 7 Vict. c. 73), ss. 37 and 39, does not apply. *In re Marsh; ex parte Marsh* (App.), 557

—— See DISCHARGE; EXECUTION; SOLICITOR AND CLIENT; PRACTICE.

Bank Shares. See PRINCIPAL AND AGENT.

Bastardy—jurisdiction: service in Scotland of summons issued in England: Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), ss. 3 and 4: Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), ss. 51 and 54: Summary Jurisdiction (Process) Act, 1881 (44 & 45 Vict. c. 24), ss. 4 and 6. *Berkeley* v. *Thompson* (M.C. 57), 322

Bill of Exchange. See BANKRUPTCY.

Bill of Lading. See SHIP AND SHIPPING.

Bill of Sale—*after-acquired property: pledge: legal title: equitable title: judicature act*, 1873, *s.* 25, *sub-s.* 11]—A pledgee of goods, which are subject to an assignment as after-acquired

Bill of Sale (continued)—

property under a bill of sale, who has no notice of the bill of sale, has a good title against the bill of sale holder. *Joseph* v. *Lyons* (App.), 1

A bill of sale assigning property to be afterwards acquired confers only an equitable title on the grantee, which gives way to a legal title acquired without notice of the bill of sale. Ibid.

—— *after-acquired property: equitable title: subsequent bill of sale: legal title: possession taken by grantee of equitable title*]—A bill of sale assigning property to be afterwards acquired confers only an equitable title on the grantee, who cannot, by taking possession under the bill of sale, oust a legal title which has been acquired without notice of the bill of sale and before possession has been taken by the grantee. *Hallas* v. *Robinson* (App.), 364

Joseph v. *Lyons* (*ante*, p. 1) followed. Ibid.

—— *registration: pledge: immediate transfer of possession: transfer in ordinary course of business: bills of sale acts*, 1878 *and* 1882 (41 *&* 42 *Vict. c.* 31, *and* 45 *&* 46 *Vict. c.* 43)]—A document accompanying a transaction by way of deposit or pledge of personal chattels, the object and effect of which is to transfer the immediate possession of the chattels from the grantor to the grantee, is not a bill of sale within the operation of the Bills of Sale Acts, 1878 and 1882. *In re Hall; ex parte Close*, 43

Quære, whether a pledge by a trader of stock-in-trade, which he has bought on credit and not paid for, is a "transfer of goods in the ordinary course of business of any trade or calling," within the meaning of that expression in the Bills of Sale Act, 1878, s. 4. Ibid.

Reeves v. *Barlow* (53 Law J. Rep. Q.B. 192; Law Rep. 12 Q.B. D. 436) explained. Ibid.

—— *registration: renewal: sale out and out under power of sale: apparent possession: bills of sale acts*, 1854, 1866, 1878 (*s.* 8), *and* 1882 (*s.* 3)]—A bill of sale of household furniture was granted in 1873 to the respondents, and duly registered, but the registration was not renewed. The debtor remained in possession of the goods. In 1883, after an action had been commenced by the appellants against the debtor, the respondents, with a view to protecting the goods from seizure in execution, sold the goods to the debtor's son, who executed to them a new bill of sale as security for the purchase-money, 250*l.* This bill was registered under the Bills of Sale Act, 1882. The appellants obtained judgment against the debtor and levied execution on the goods, whereupon the respondents claimed the property, and the sheriff interpleaded. On the trial of an interpleader issue the jury found that the transactions between the respondents and the debtor's son were *bona fide*:—*Held*, that the Bills of Sale Acts, 1878 and 1882, never applied to the bill of sale of 1873; that under the Acts of 1854 and 1866 it was, though unregistered, valid as against the grantor; and that the exercise of the power of sale at a time when there was no execution creditor or other person entitled to the property as against the respondents put an end to the bill, and conferred an absolute title on the purchaser. *Held*, therefore, that, whether or not the goods were in the apparent possession of the debtor at the time of the execution, the respondents had a good right to them as against the appellants. *Cookson* v. *Swire* (H.L.), 249

—— *transfer: bills of sale act*, 1878 (41 *&* 42 *Vict. c.* 31), *ss.* 4 *and* 10: *reputed ownership: hotel furniture: bankruptcy*]—An agreement accompanying the deposit of a registered bill of sale by way of equitable sub-mortgage is a "transfer or assignment" of a bill of sale which by section 10 of the Bills of Sale Act, 1878, need not be registered. *In re Parker & Co.; ex parte Turquand* (App.), 242

The existence of the general habit among hotel-keepers of hiring the hotel furniture excludes the idea of reputed ownership altogether in regard to such furniture, and not merely when the true owner is the lender of the furniture. Ibid.

—— 45 *&* 46 *Vict. c.* 43. *s.* 9: *non-accordance with scheduled form: time of payment*]—By a bill of sale the grantor agreed that if he should not duly pay to his creditors a certain instalment of a composition on the 24th of May, 1883, and the grantee should, under a guarantee given by him, be obliged to pay the same, he the grantor would repay that sum to the grantee within seven days after demand; and a power of seizure on default was given:—*Held*, that the bill of sale was void as not being in accordance with the form in the schedule to 45 & 46 Vict. c. 43, as to the stipulating of a time for payment. *Sibley* v. *Higgs* (*Taplin claimant*), 525

—— See MORTGAGOR AND MORTGAGEE.

Borrowing Powers. See COMPANY.

Bread—sale by weight: delivery from cart without weights and scales: prior order: 6 & 7 Will. 4. c. 37. s. 7. *Ridgway* v. *Ward* (M.C. 20), 176

—— duty to have scales in cart: bread weighed in shop in purchaser's presence, and sent out to oblige the purchaser: 6 & 7 Will. 4. c. 37. s. 7. *Daniel* v. *Whitfield* (M.C. 134), 520

Caretaker. See REVENUE.

Cargo. See SHIP AND SHIPPING.

Carrier—*consignment note: construction of: statement that "consignee pays carriage": implied liability of consignor on refusal of consignee*]—Where a consignor delivers goods to a railway company, to be carried under a consignment note which states that the carriage is to be paid by the consignee, he may nevertheless be sued by the railway company for the carriage if the consignee refuse to pay it: the true construction of the contract being that the consignor, while stating that as between the consignee and himself the former is to pay the carriage, undertakes, upon the carriers performing their agreement in carrying the goods to their destination, to be answerable for the freight if it is not paid by the consignee. *The Great Western Rail. Co.* v. *Bagge*, 599

—— See RAILWAY COMPANY.

Cause of Action. See PROHIBITION.

Charging Order. See SOLICITOR AND CLIENT.

Charter-Party. See SHIP AND SHIPPING.

Check-Weigher. See COAL MINE.

Choses in Action. See COMPANY.

Church and Clergy—*ecclesiastical dilapidations act*, 1871 (34 & 35 *Vict. c.* 43): *powers of sequestrator: repairs to rectory: report of surveyor*]—Since the passing of the Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43), the decision as to what sums are required to be expended upon the repairs of a living is vested in the diocesan surveyor. A sequestrator has therefore no power to spend a sum in repairing the dilapidations beyond what is reported to be necessary by such surveyor without getting a further survey or report. *Kimber* v. *Paravicini*, 471

Coal Mine—*check-weigher: person employed in the mine: coal mines regulation act*, 1872 (35 & 36 *Vict. c.* 76), *s.* 18]—By 35 & 36 Vict. c. 76. s. 18, persons employed in a coal mine may at their own cost station a check-weigher at the place for weighing the coal, who "shall be one of the persons employed either in the mine at which he is so stationed, or in another mine belonging to the owner of that mine":—*Held*, that the check-weigher must be in the employment of the mine-owner at the time of his election to the office. *Hopkinson* v. *Caunt*, 284

The plaintiff was in February, 1883, stationed as check-weigher by the men employed in a mine, he being at the time in the employment of the owner of the mine. He continued to act as check-weigher up to the 30th of July, 1884, when he received fourteen days' notice from the men to discontinue his employment. This notice was given because the men intended to reduce the check-weigher's wages from 35*s.* to 30*s.* a week. Before the expiration of the notice the men held an election for the office of check-weigher, when the plaintiff was again elected:—*Held*, that the plaintiff was not qualified for re-election, because not "employed in the mine" within the meaning of the above Act, and that the owner was therefore justified in preventing him from acting as check-weigher. Ibid.

Committal—order of. See BANKRUPTCY.

—— See BANKRUPTCY.

Common Informer. See PENALTY.

Company—*company incorporated by statute: power to borrow: ultra vires*]—A company was incorporated by Act of Parliament for a particular object. The incorporating Act and subsequent amending Acts did not expressly authorise or forbid the company to borrow. In the year 1851 an Act was passed which empowered the company to borrow for certain purposes and in a certain manner sums not exceeding in the whole 50,000*l.* Between 1870 and 1878 the company borrowed upon covenant under their seal large sums in excess of the amount of 50,000*l.* An action having been brought upon the covenant to recover these sums,—*Held* (affirming the decision of the Court of Appeal), that the action could not be maintained, for that whether or not the company had by implication power to borrow before 1851, they were by the Act of that year prohibited from borrowing except in accordance with its provisions. *Baroness Wenlock* v. *The River Dee Co.* (H.L.), 577

The decision in *The Ashbury Company* v. *Riche* (43 Law J. Rep. Exch. 177; 44 Law J. Rep. Exch. 185; Law Rep. 9 Exch. 224; ibid. 7 H.L. 653) applies not merely to companies incorporated under the Companies Acts, but to all companies created by statute for a particular purpose. Ibid.

—— *contract to take shares: contract induced by fraud of secretary of company: liability of directors of company for: authority of secretary to make representations: principal and agent*]—The secretary of a company has no general authority to make representations to induce persons to take shares in a company: so that a person who is induced to take

Company (continued)—

shares in a company by a fraudulent misrepresentation, not authorised by or known to the officers of the company entitled to make representations, of the secretary of a company is not entitled to maintain an action against the company for the rescission of the contract, or for damages for such misrepresentation. *Newlands* v. *The National Employers' Accident Association* (*Lim.*) (*in liquidation*) (App.), 428

—— *refusal to register transfer of shares: measure of damages: companies act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 26]—Section 26 of the Companies Act, 1867, is for the protection of a transferor of shares in a registered company, and enables him to compel the company to register the transfer in case the transferee fails to do so. But the section has made no alteration as regards the ordinary contract for the sale of shares in a company, under which a transferor, in consideration of the price of such shares, is bound to execute a valid transfer and hand the certificates to the transferee, whilst the transferee is bound to get the transfer registered. The plaintiff, under an alleged agreement that certain shares which he held in a company should be taken by one L. in payment of a debt due from him to L. if such shares were registered, executed a valid transfer of the same and handed the certificates to L. The plaintiff applied to the company under section 26 of the Companies Act, 1867, to register the transfer, but they refused to do so upon the ground that he was indebted to them. The question of his indebtedness was decided in his favour in an action between him and the company, and the transfer was subsequently registered. The company had no notice of the alleged agreement between the plaintiff and L., the transfer being expressed to have been executed for a nominal sum. The market value of the shares having fallen considerably between the date when the transfer was executed and that at which it was actually registered, the plaintiff sought to recover damages from the company for their wrongful refusal to register the transfer:—*Held*, that the plaintiff was only entitled to recover nominal damages, as the company had received no notice of the alleged agreement between him and L., and also because he had suffered no damage either in respect of calls or otherwise from the refusal of the company to register the transfer. *Skinner* v. *The City of London Marine Insurance Corporation* (*Lim.*) (App.), 437

—— *registration: company projected by less than twenty subsequently increasing to more than twenty members: agreement after registration to abide by contracts made before registration: companies act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 4]—An association projected by less than twenty persons, but subsequently increasing in number, as soon as it consists of more than twenty persons comes within the prohibition in section 4 of the Companies Act, 1862. *In re Thomas; ex parte Poppleton*, 336

And this is so, notwithstanding that the business of the association is carried on by a committee of less than twenty persons, as agents of the association. Ibid.

Crowther v. *Thorley* (32 W. R. 330) distinguished. Ibid.

Where such an association established for the purpose of making loans to the members is subsequently registered, it is competent for the several members to agree to treat the engagements entered into by the old association as binding on the new association; and the agreement of one member is a good consideration for the agreement of the others. Ibid.

—— *separate undertaking: separate capital: liability to general creditors: solicitor*]—Where the solicitors of the promoters of an Act of Parliament, whereby a company is created and empowered to raise capital and carry out works, and, if they so resolve, to raise separate capital for and carry out separately certain portions of such works as a separate undertaking, agree to pay certain claims out of the first capital raised by the company, and the company duly raise capital for the separate undertaking and none other, neither the company nor the solicitors are liable under the agreement. *Allan* v. *The Regent's Canal, City and Docks Rail. Co*, 201

—— *shares: choses in action: notice to company: companies act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 22 *and* 30: *priority: recognition of trusts by company and its officers*]—The later in time of two persons holding from the registered shareholder agreements to transfer shares in a company registered under the Companies Act, 1862 and 1867, neither of whom has a transfer giving him a title to be registered by the company, does not obtain a title superior to that of the holder of the first agreement by first giving notice of his agreement to the company. *Société Générale de Paris* v. *Tramways Union Co.* (*Lim.*) (App.), 177

Section 30 of the Companies Act, 1862, which provides that no notice of any trust shall be entered on the register or be receivable by the Registrar, means that no notice of a trust is to be taken by the company, although (*per* COTTON, L.J., and LINDLEY, L.J., *dubitante* BRETT, M.R.), if the directors have knowledge of circumstances rendering it wrong to accept a transfer, they may be personally liable. Ibid.

Information given at the funeral of a shareholder to a relative who was secretary of the company, held not to amount to notice to the company. Ibid.

Company (continued)—

The execution by a registered shareholder of a deed of transfer, blank as to the name of the transferee and the number and numbers of shares, which blanks were subsequently filled in without re-execution and without the transferor seeing the deed in its complete state, does not confer a legal title to the shares. Ibid.

Martin v. *Sedgwick* (9 Beav. 333) commented on. Ibid.

—— See PRACTICE.

Compensation. See LANDS CLAUSES ACT; PUBLIC HEALTH.

Composition. See BANKRUPTCY.

Composition Deed—*preference to one creditor: effect of on deed*]—A deed of arrangement for the payment of a composition made between a debtor and his creditors must, whether it is or is not made under the provisions of a statute, be based and carried out on the principle of perfect equality. The law implies, in the absence of any express provision to the contrary, a term or condition in such a deed that the debtor agrees with the creditors, and the creditors agree with him and with each other, that all who are parties to the deed shall come in and be placed on exactly the same footing: so that the acceptance by one creditor of a bonus or gratuity beyond that secured to all by the deed will, if that bonus is paid with the knowledge of the debtor, though not by him or out of his estate, entitle any other creditor who is a party to the deed to avoid it, and to proceed as though the deed were cancelled. *In re Milner; ex parte Milner* (App.), 425

Dauglish v. *Tennent* (36 Law J. Rep. Q.B. 10) approved. Ibid.

Concealment. See SHIP AND SHIPPING.

Condition Precedent. See SHIP AND SHIPPING.

Conditions of Sale. See VENDOR AND PURCHASER.

Consignment Note. See CARRIER.

Conspiracy. See INJUNCTION.

Constables. See PRACTICE.

Consul. See BANKRUPTCY.

Contract—*illegality: money paid for illegal object: completion of the object: deposit by convicted person to secure surety for good behaviour*]—Where a person is upon conviction of a criminal offence required to find a surety for his good behaviour, and by agreement with his surety deposits money with him, he cannot afterwards recover it. *Hermann* v. *Jeuchner* (App.), 340

The illegal object is sufficiently complete when the deposit has been made and the security executed, and the principal cannot by repudiating the transaction before the security is forfeited and the money applied as an indemnity recover the money. Ibid.

The deposit of money by a person required to find a surety for his good behaviour to secure his surety is contrary to public policy, and no legal contract arises out of it. Ibid.

Wilson v. *Strugnell* (50 Law J. Rep. M.C. 145; Law Rep. 7 Q.B.D. 548) overruled. Ibid.

—— *indemnity: seizure of goods for another's debt: lawful seizure: property in goods: as against judgment creditor: effect of barring claim*]—Where an execution has been levied on goods which as between the execution debtor and a third person are the third person's, but as between the execution creditor and the third person are the execution debtor's, the case comes within the principle that a debtor is liable to indemnify a person whose goods have been lawfully seized for his debt, and the third person can recover the sum realised by the goods from the execution debtor. *Edmunds* v. *Wallingford* (App.), 305

The sheriff had seized goods for the debt of the defendant, and the claim of the plaintiff to the goods was barred upon interpleader, but the defendant had bound himself by admission as between the parties that the goods were the plaintiff's, and had agreed to pay a sum of money in consideration of the seizure:—*Held*, that the plaintiff was entitled to recover that sum from the defendant. Ibid.

Griffenhoofe v. *Daubuz* (25 Law J. Rep. Q.B. 237) explained. Ibid.

England v. *Marsden* (35 Law J. Rep. C.P. 259) not followed. Ibid.

—— *measure of damages: breach of contract: purchase of goods to fulfil sub-contract*]—The defendants contracted with the plaintiff to deliver in Paris a certain number of sheepskins on certain specified terms as to quantity, price, and times of delivery. At the time of making the contract the defendants knew that the plaintiff was making it in order to fulfil another contract which was either then made or about to be made by him with a customer in Paris. The plaintiff, under this contract, sold the skins at a profit of five francs per skin. There was no market into which either the plaintiff or his customer could go to purchase the skins in question in the event of a breach of the contract. The defendants did not deliver the whole of the skins, and thereupon the plaintiff's customer sued the

Contract (continued)—

plaintiff in France for breach of contract, and recovered damages. In an action against the defendants for breach of contract,—*Held*, that the plaintiff was entitled to recover both the amount of profit which he would have made if he had fulfilled his contract with his customer, and also the damages paid by him in respect of his liability for breach of the contract with his customer, and that the amount recovered against him in France might, under the circumstances, be taken as a not unreasonable amount in estimating the damages for the defendants' breach of contract. *Grébert-Borgnis* v. *Nugent* (App.), 511

—— under seal. See PUBLIC HEALTH.

—— See BANKRUPTCY; COMPANY; PRINCIPAL AND AGENT; PUBLIC HEALTH; SALE OF GOODS.

Co-operation—foreign. See PRACTICE.

Corporation. See MUNICIPAL CORPORATION; NEGLIGENCE; PRACTICE.

Costs—security for. See BANKRUPTCY; LANDLORD AND TENANT; PRACTICE; SOLICITOR AND CLIENT.

Counsel. See PRACTICE.

Counter-claim. See ESTOPPEL.

County Court—*jurisdiction of judge to order repayment of money paid out of court to execution creditor by mistake: warrant under seal of court for amount: non-liability of registrar and bailiff or other person acting under*: 13 & 14 *Vict. c.* 61. *s.* 19: 15 & 16 *Vict. c.* 54. *s.* 6] —Section 19 of 13 & 14 Vict. c. 61, and section 6 of 15 & 16 Vict. c. 54, protect the Registrar of a County Court and the bailiff and his assistants from liability to be sued in an action for seizing the goods of a party under a warrant of the Court signed by the Registrar and under the seal of the Court, even assuming that the Judge had no jurisdiction to make the order upon which the warrant is founded. *Aspey* v. *Jones* (App.), 98

Section 6 of 15 & 16 Vict. c. 54 also affords a like protection to any person who acts under a warrant so issued. Ibid.

—— See BANKRUPTCY; EMPLOYERS' LIABILITY ACT; ESTOPPEL; PRACTICE.

Covenant. See HUSBAND AND WIFE; LESSOR AND LESSEE; VENDOR AND PURCHASER.

Coverture. See LUNATIC.

Creditor and Debtor—*judgment over six years old: execution: garnishee order: attachment: rules of court*, 1883, *order XLII. rules* 6 *and* 8; *order XLV.*]—A garnishee order can be obtained in respect of a debt due to a judgment debtor notwithstanding that more than six years have elapsed since the date of the judgment. *Fellows* v. *Thornton.* (*Young, garnishee*), 279

Creditors. See COMPOSITION DEED.

Criminal Law—*libel: criminal information: newspaper libel and registration act*, 1881 (44 & 45 *Vict. c.* 60), *s.* 3: *fiat of director of public prosecutions*]—Section 3 of the Newspaper Libel and Registration Act, 1881, which enacts that "No criminal prosecution shall be commenced against any proprietor, publisher, editor, or any person responsible for the publication of a newspaper, for any libel published therein, without the written *fiat* or allowance of the Director of Public Prosecutions in England, or Her Majesty's Attorney-General in Ireland, being first had and obtained," does not apply to criminal informations for libel. *Yates* v. *The Queen* (App.), 258

Crown Suits. See INFORMATION.

Damages—measure of. See CARRIER; COMPANY; CONTRACT; RAILWAY COMPANY.

Debtor and Creditor—*accord: agreement to accept less sum than debt*]—The doctrine stated in *Pinnel's Case* (5 Rep. 117), and recognised in *Cumber* v. *Wane* (1 Str. 426; 1 Sm. L.C. (8th ed.) 357), that "payment of a lesser sum in satisfaction of a greater cannot be a satisfaction of the whole," has been too long accepted as law to be disturbed. *Foakes* v. *Beer* (H.L.), 130

An agreement by a judgment creditor, in consideration of immediate payment of part of the debt, to accept payment to himself or his nominee of the residue of the debt and costs by instalments without interest in full satisfaction of the judgment, falls within the above doctrine, and does not bar the creditor from issuing execution for interest on the judgment debt after all the instalments have been paid. Ibid.

—— See COMPANY; CREDITOR.

Debtors' Act. See BANKRUPTCY.

Debtor's Summons—"*means to pay the debt*": *voluntary gift: debtors act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 5, *sub-s.* 2]—*Semble*, an allowance voluntarily given to the defendant may

Debtor's Summons (continued)—

be "means to pay the debt" which he must have, or have had since the judgment, so as to give jurisdiction to commit him to prison. *Koster* v. *Park* (App.), 389

Debts. See BANKRUPTCY.

Dedication. See MARKET.

Demurrage. See SHIP AND SHIPPING.

Deposit—return of. See VENDOR AND PURCHASER.

Dilapidations. See CHURCH AND CLERGY.

Discharge. See BANKRUPTCY.

Disclaimer—*by trustee: bankruptcy: leasehold interest of bankrupt: partner of bankrupt compelled to pay rent: imposition of terms: trustee and cestui que trust: bankruptcy act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 23: *bankruptcy rules*, 1871, *rule* 28]—T. & S. were partners and joint lessees of certain business premises. On dissolution of the partnership the lease was assigned to S., he undertaking the liabilities of the business and covenanting to pay the rent, and T. covenanting to stand possessed of his interest in the premises as trustee for S. S. filed a liquidation petition, and the trustee sublet the premises at a nominal rent, in order to keep the machinery in working order and prevent deterioration from disuse. The trustee refused to pay rent, part of which was due at the date of the liquidation and part of which had since accrued. T. was compelled to pay it:—*Held*, that the trustee could only obtain leave to disclaim the lease upon the terms of his paying to T. the rent of the premises as from the date of his appointment until the day when his beneficial occupation thereof ceased. *In re Salkeld; ex parte Good* (App.), 96

—— *of lease without leave of court: bankruptcy: liability of trustee for rent during occupation: bankruptcy act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 55: *bankruptcy rules*, 1883, *rule* 232]—The Court has no power to impose conditions upon a trustee disclaiming a lease under section 55 of the Bankruptcy Act, 1883, in cases in which the trustee is entitled to disclaim without the leave of the Court. *In re Sandwell; ex parte Zerfuss*, 323

—— See BANKRUPTCY.

Discovery. See BANKRUPTCY; PRACTICE.

Distress. See LANDLORD AND TENANT; TRESPASS; WATERWORKS COMPANY.

Diversion of Highway. See NEGLIGENCE.

Divorce. See BANKRUPTCY.

Documents—inspection of. See PRACTICE.

Domicil. See PRACTICE.

Donor and Donee. See GIFT OF CHATTELS.

Easement—*right of way: life estate in servient tenement: "reversion": meaning of, as distinguished from "remainder": prescription act* (2 & 3 *Will.* 4. *c.* 7), *s.* 8]—By section 8 of the Prescription Act (2 & 3 Will. 4. c. 71), where the land over which the right of any way shall have been enjoyed has been held under or by virtue of any term of life, the time of the enjoyment of any such way during the continuance of such term shall be excluded in the computation of the said period of forty years, in case the claim shall within three years next after the end or sooner determination of such term be revoked by any person "entitled to any reversion expectant on the determination thereof":—*Held*, that the word "reversion" is to be read in its strict legal signification, and does not include "remainder," and that a remainderman cannot avail himself of the provisions of the section to resist the claim within three years of his remainder falling into possession on the termination of the preceding life estate. *Symons* v. *Leaker*, 480

Ecclesiastical Law. See CHURCH AND CLERGY.

Ejectment. See LANDLORD AND TENANT.

Election. See MUNICIPAL ELECTION.

Elementary Education Act (33 & 34 Vict. c. 75), s. 74: School Board by-laws: causing child to attend school: child sent to school without payment of prescribed fee: liability of parent to penalty. *The School Board for London* v. *Wood* (M.C. 145), 582

Employers' Liability. See MASTER AND SERVANT; PRACTICE.

Equitable Rights. See BILL OF SALE.

Estate Tail. See WILL.

Estoppel—*counter-claim: county court: action in high court for same cause of action: effect of verdict and judgment in county court: judicature act*, 1873 (36 & 37 *Vict. c.* 66), *ss.* 89 *and* 90]—Where in an action in a County

Estoppel (continued)—

Court a defendant has relied upon a cause of action by way of counter-claim, upon which he has obtained a verdict for an amount beyond the jurisdiction of the County Court, and judgment has been entered for the defendant, but no relief has been given in respect of the balance in excess of the plaintiff's claim, the defendant is not estopped from afterwards bringing an action in the High Court upon the same cause of action. *Webster* v. *Armstrong*, 236

The defendant in the High Court is estopped by the verdict and judgment of the County Court from denying the cause of action of the plaintiff in the High Court, and the only question to be decided in the High Court is the amount of damages. Ibid.

—— *foreign judgment: defendant not resident in, nor a subject of the foreign country: appearance to protect property from seizure in case of judgment by default*]—It is no answer to an action upon the judgment of a foreign Court that at the time of the proceedings in the foreign Court the defendant was not resident or domiciled or under allegiance in the foreign country and appeared in the foreign Court as defendant merely to protect his property from seizure in case judgment by default should be given against him in the foreign Court. *Voinet* v. *Barrett*, 521

There is no difference between a case where the object of the defendant in appearing is to protect property actually seized and a case in which his object is to protect property which may become liable to seizure.

De Cosse Brissac v. *Rathbone* (6 Hurl. & N. 301; 30 Law J. Rep. Exch. 238) followed. Ibid.

Dictum of PARKE, B., in *The General Steam Navigation Company* v. *Guillon* (11 Mee. & W. 877, at p. 894; 13 Law J. Rep. Exch. 168, at p. 176) dissented from. Ibid.

Schibsby v. *Westenholz* (40 Law J. Rep. Q.B. 73; Law Rep. 6 Q.B. 155) questioned. Ibid.

—— See SHIP AND SHIPPING.

Event. See PRACTICE.

Evidence. See BANKRUPTCY; PARLIAMENT.

Examination. See BANKRUPTCY.

Execution — *notice of bankruptcy petition: "sheriff": "officer charged with execution of process": mayor's court process: bankruptcy act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 46, *sub-s.* 2, *and s.* 168]—The "officer charged with the execution of process," included by section 168 of the Bankruptcy Act, 1883, in the term "sheriff," is the officer analogous to the sheriff so charged by the constitution of Courts other than the High Court, to whom notice of a bankruptcy petition must be given under section 46, sub-section 2, upon a sale under an execution for more than 20*l*. *In re Holland; ex parte Warren* (App.) 320

In a Mayor's Court action, the notice should be given at the office of the sergeant-at-mace to him or his representative; and a notice to sheriff's officers in possession of the debtor's goods under previous High Court writs to whom the sergeant-at-mace had entrusted the execution of his writ, given after they had paid over the proceeds to the sergeant-at-mace, was held insufficient. Ibid.

—— *bankruptcy: duties of sheriff as to good taken in execution: several writs in hands of the sheriff: sale: proceeds of executions upon judgments exceeding* 20*l.*: *proceeds of executions upon judgments less than* 20*l.*: *bankruptcy act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 46 *sub-ss.* 1 *and* 2]—Section 46, sub-section 2 of the Bankruptcy Act, 1883, does not render void an execution upon a judgment for a sum exceeding 20*l.*, where the sheriff, within fourteen days after the sale of the goods, is served with notice of a bankruptcy petition having been presented against the debtor, upon which the debtor is subsequently adjudicated bankrupt; but merely provides that, instead of handing the proceeds of the execution over to the execution creditor, the sheriff shall hand them over to the trustee in the bankruptcy. *In re Pearce; ex parte Crosthwaite*, 316

The duty of a sheriff who has several writs of execution to execute is to execute first that writ which is first delivered to him; and when he has sold enough to satisfy that writ, to sell under the next in order. Therefore, if the proceeds of the sale of the goods of a debtor are not enough to satisfy the earlier writs in the hands of the sheriff, there can be no sale under the subsequent writs. Ibid.

Where a sheriff is entrusted with the execution of several writs against the goods of a debtor, the proceeds of which are not enough to satisfy all the writs, the duty of the sheriff is to pay the amounts of the several writs in the order of priority in point of time, making the payments in the case of judgments for less than 20*l.* to the execution creditors, and in the case of judgments for more than 20*l.* to the trustee of the debtor, if within fourteen days after sale notice is served upon the sheriff of a bankruptcy petition upon which the debtor is adjudged bankrupt. Ibid.

Cases decided under 6 Geo. 4. c. 16. s. 108, and *Ex parte Lovering; in re Peacock* (43 Law J. Rep. Bankr. 58; Law Rep. 17 Eq. 452) distinguished. Ibid.

—— stay of. See PRACTICE.

—— See CONTRACT.

Executor. See ACTION; DEBTOR AND CREDITOR.

Fixtures—*mortgagor and mortgagee: tenancy created by mortgagor after mortgage: claim of tenant to trade fixtures*]—A mortgagor remaining in possession of the mortgaged premises let them to a tenant who brought in trade fixtures:—*Held*, that the tenant was entitled to remove the fixtures as against the mortgagee as well as against the mortgagor. *Sanders* v. *Davis*, 576

—— See MORTGAGOR AND MORTGAGEE.

Food and Drugs Acts (38 & 39 Vict. c. 63, and 42 & 43 Vict. c. 30): sale of drug not of the nature demanded by purchaser: absence of adulteration. *Knight* v. *Bowers* (M.C. 108), 515

—— s. 6: article of food: sale to prejudice of purchaser: skimmed milk. *Lane* v. *Collins* (M.C. 76), 329

Foreign Corporation. See PRACTICE.

Foreign Judgment. See ESTOPPEL.

Forfeiture. See LANDLORD AND TENANT.

Frauds—statute of. See HUSBAND AND WIFE.

—— See COMPANY; SALE OF GOODS.

Freight. See SHIP AND SHIPPING.

Game. See NUISANCE.

Gaming—Betting Houses Act (16 & 17 Vict. c. 119): place used for the purpose of betting: persons resorting thereto. *Snow* v. *Hill* (M.C. 95), 419

Garnishee. See SOLICITOR AND CLIENT.

Garnishee Order. See CREDITOR AND DEBTOR.

Gas. See HIGHWAY.

General Average. See SHIP AND SHIPPING.

Gift. See HUSBAND AND WIFE.

Gift of Chattels—*retention of possession by donor*]—In order to make an effectual gift of chattels there must be an immediate present gift of the chattels, and not merely an expression of intention to make a future gift. *In re Ridgway; ex parte Ridgway*, 570

Per CAVE, J.—Retention of possession by the donor of a chattel is not conclusive proof that there is no immediate present gift by him of the chattel. Ibid.

Grant. See MARKET.

Guardian. See POOR.

Habeas corpus *ad testificandum: prisoner: litigant in person imprisoned: 44 Geo. 3. c. 102: party to a motion*]—Pending the argument of a case in the Court of Appeal, the appellant, who proposed to appear and argue in person, was sentenced to imprisonment in respect of a charge of libel:—*Held*, affirming the decision of POLLOCK, B., that the Court had no power under the circumstances to award a writ of *habeas corpus* to bring the appellant before the Court with a view to her arguing her appeal, as the provisions of 44 Geo. 3. c. 102 had no application to such a case. *Weldon* v. *Neal*, 399

Highway—main road: repair: costs of maintenance: contribution: "county": "county authority of the county in which such road is situate": Highway Act, 1862 (25 & 26 Vict. c. 61), s. 2: Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), ss. 13 and 38. *The Mayor &c. of Over Darwen* v. *The Justices of Lancashire* (M.C. 51), 238

—— main roads: turnpike roads: provisional order declaring a main road to be a highway: time for application for: local government board: Highways and Locomotives Amendment Act, 1878 (41 & 42 Vict. c. 77), ss. 13 and 16. *Reg.* v. *The Local Government Board*, (M.C. 104), 496

—— *mode of repairing: gas company, with statutory power to lay pipes under: damage to pipes: power of highway authority:* 31 & 32 *Vict. c.* cvi., 23 & 24 *Vict. c.* 125. *s.* 62, 14 & 15 *Vict. c.* cxvi., 10 *Vict. c.* 34, 18 & 19 *Vict. c.* 120. *ss.* 25, 26, *and* 27]—The plaintiffs, a gas company, having statutory powers to place mains and pipes under the highways, and a statutory obligation to supply gas within the parish of K., laid, prior to 1872, certain pipes under certain highways within the jurisdiction of the defendants, who, being the highway authority for the district, were, by virtue of 10 Vict. c. 34, 18 & 19 Vict. c. 120, and 25 & 26 Vict. c. 102, bound to repair the highways, and empowered to pave and alter the level of streets under their management. In 1872 the defendants began to use steam rollers of considerable

Highway (continued)—

weight for the purpose of repairing the highways, and thereby fractured certain pipes belonging to the plaintiffs laid under the highways:—*Held*, that the plaintiffs were entitled to an injunction restraining the defendants from using any steam rollers in such a way as to fracture or damage any pipes belonging to the plaintiffs which were properly laid under the highways within the jurisdiction of the defendants. *The Gas Light and Coke Co.* v. *The Vestry of St. Mary Abbotts, Kensington* (App.), 414

—— turnpike road: expiration of trust: part of road within local district: liability to contribute to repair: Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 13: turnpike road. *The Improvement Commissioners for the District of Newton-in-Makerfield* v. *The Justices of the Peace for the County Palatine of Lancaster* (M.C. 1), 123

—— See MARKET; NEGLIGENCE.

Highway Board. See POOR.

Hotel Furniture. See BILL OF SALE.

House of Commons. See PARLIAMENT.

House of Lords. See PRACTICE.

House Tax. See REVENUE.

Husband and Wife —*gift: parol agreement before marriage: conduct of husband afterwards*]—A parol agreement before marriage that money of the intended wife at the bank shall be hers for her separate use, followed by the wife dealing with it with the husband's knowledge, and the husband not interfering, held to amount to a gift to the wife for her separate use. *In re Whitchead; ex parte Routh* (App.), 240

Judgment of CAVE, J. (*ante*, p. 88), reversed.

—— *house the separate property of wife: trespass: power of husband not living there to authorise entry on: married women's property act*, 1870 (33 & 34 *Vict. c.* 93), *ss.* 1, 11: *married women's property act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-s.* 2, *s.* 12]—A married woman, living apart from her husband in a house bought by her in 1871 with money acquired by her through the exercise of her artistic skill within the meaning of 33 & 34 Vict. c. 93. s. 1, sued the defendant for trespass by entering the house in 1878 against her will and remaining there ten minutes, without doing any damage to the house. The defendant alleged that he entered the house by the authority and as the servant of the husband of the plaintiff:—*Held*, that the plaintiff was entitled to maintain the action without joining her husband as a plaintiff; that her husband, not living with her, could not authorise another person to enter against her will a house which, by 33 & 34 Vict. c. 93. s. 1, was to be deemed and be taken to be property settled to her separate use, and therefore that a trespass had been committed by the defendant, for that whether a husband can or cannot in such circumstances as existed in this case enter such a house himself against his wife's will, he cannot authorise other persons to enter for an object not connected with or incident to his desire to live in the house. *Weldon* v. *De Bathe* (App.), 113

—— *marriage settlement: after-acquired property: become entitled during the coverture: wedding presents*]—By a marriage settlement executed the day before and in anticipation of a marriage solemnised on the 22nd of March, 1881, it was declared that all property to which the wife or the husband in her right at any time during the coverture should become entitled, whether in possession, reversion, or otherwise (except jewels, &c., which were to belong to the wife for her separate use, and except property acquired at one time not exceeding 300*l.* in value), should be settled upon certain trusts. A subsequent clause in the settlement referred to the trusts thereinbefore declared and contained concerning such part of the personal estate to which the wife then was or she or the husband in her right should become entitled as aforesaid as should consist originally of money. There were no trusts thereinbefore declared relating to any property to which the wife was then entitled, unless such property was included in the declaration above mentioned:—*Held*, that jewels which, being the property of the wife before the marriage, vested in the husband *eo instanti* of the marriage, were property to which he became entitled in her right during the coverture within the meaning of that settlement, and consequently by force of the instrument belonged to her for her separate use. *Williams* v. *Mercier* (H.L.), 148

—— *married women's property act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-s.* 4: *promissory note: contract made before passing of act: separate property: restraint on anticipation*]—Sub-section 4 of section 1 of the Married Women's Property Act, 1882, which affects the rights of parties is not retrospective, and therefore a judgment obtained in an action brought after the passing of the Act against a married woman on a promissory note made before the passing of the Act can only be enforced against so much of her separate estate as, free from restraint on anticipation,

Husband and Wife (continued)—

would have been liable before the passing of the Act. *Turnbull* v. *Forman* (App.), 489

Conolan v. *Leyland* (54 Law J. Rep. Chanc. 123) approved. Ibid.

Bursill v. *Tanner* (Law Rep. 13 Q.B. D. 691) questioned. Ibid.

—— *separation deed: covenant for payment of annuity: covenant that wife should not molest husband: independent covenants: molestation*]—To an action by the wife's trustee in a separation deed against the husband for arrears of annuity covenanted to be paid by him, the defendant set up as an answer the breach of the trustee's covenant that his wife should not molest him; he further counter-claimed damages for molestation by her. The wife had been living during the separation in adultery, and had given birth to a child, of which the defendant was not the father; there was some evidence that the child whilst in its mother's house was called by the courtesy title borne by the eldest son of her husband, but there was no evidence that it was so called with her knowledge or consent:—*Held*, that the two covenants were independent, and that molestation by the wife afforded no answer to the action for the arrears of annuity. *Held also*, that the fact of the wife living in adultery, even though coupled with that of having given birth to a bastard child, did not constitute molestation within the meaning of the covenant. *Held also*, that molestation must be an act done by the wife herself, or by an agent duly authorised by her to do it, and with the intention to annoy the husband. *Held also*, that if the wife caused the child to be called by her husband's name and second title, and held it out as being the husband's son and heir, that would amount to molestation. *Fearon* v. *The Earl of Aylesford* (App.), 33

—— See BANKRUPTCY.

Illegality. See CONTRACT.

Imprisonment for Debt. See BANKRUPTCY.

Income. See BANKRUPTCY.

Income Tax—*mines: deduction from profits: dead rent recoupable by royalties: 5 & 6 Vict. c. 35. s. 60 (schedule A, No. III. rule 3)*]—The lessees of a coal mine held under an agreement by which it was provided that a dead rent of 2,000*l.* should be paid to the lessor, but that when the royalties payable to him exceeded the amount of the dead rent the excess should be repaid to the lessees to make up the deficiency of the previous years. During the three years preceding 1881-82 the mine was not worked, and the lessees duly paid the dead rent; but in 1881-82 the mine was worked at a profit, and royalties exceeding the amount of the dead rent by 1,477*l.* were payable to the lessor:—*Held*, that in estimating the profits of the mine for assessment of income tax under Schedule D, the lessees could not deduct the 1,477*l.* repayable to them under the agreement. *Broughton and Plas Power Coal Co. (Lim.)* v. *Kirkpatrick*, 268

The Coltness Iron Company v. *Black* (51 Law J. Rep. Q.B. (H.L.) 626; Law Rep. 6 App. Cas. 515) followed. Ibid.

—— See REVENUE.

Indemnity. See CONTRACT; INTERPLEADER.

Indictment. See CRIMINAL LAW.

Information—*duchy of Lancaster: rights: attorney-general in high court: crown suits act (28 & 29 Vict. c. 104)*]—An information cannot be exhibited in the High Court of Justice by the Attorney-General of the Duchy of Lancaster even in respect of matters concerning the duchy. *The Attorney-General of the Duchy of Lancaster* v. *The Duke of Devonshire*, 271

—— See CRIMINAL LAW.

Injunction—*conspiracy: combination in restraint of trade: rebate freight: damages resulting to individual*]—Several shipowners, whose vessels traded regularly and all the year round to and from certain Chinese ports, formed themselves into a conference, and agreed to allow a rebate every six months of five per cent. on all freight to those merchants who shipped their goods exclusively on conference vessels, and issued a circular notice that any shipment of goods on a non-conference vessel would render the shipper liable to forfeit the rebate on all his shipments in the conference vessels. The result was that the plaintiffs, part-owners of non-conference vessels, trading to the same ports, had to ship goods at an unremunerative rate to counteract the loss of the rebate, and sustained damages, for which they sued. On an application for an interim injunction to restrain the issue of the circulars and to restrain the defendants so acting as to prevent the plaintiffs shipping goods from those ports at an unremunerative rate,—*Held*, that there being no evidence of danger of irreparable injury to the plaintiffs, and the cause of action being on the affidavits not free from doubt, the Court ought not to grant an interim injunction. *The Mogul Steamship Co.* v. *McGregor & Co.*, 540

Semble—A combination made with a view of

Injunction (continued)—

excluding particular ships from certain ports altogether, resulting in injury to the owners of such ships, and not merely to advance the trade of the persons combining, is against public policy and an actionable conspiracy. Ibid.

—— See BANKRUPTCY.

Insolvent Deceased. See BANKRUPTCY.

Insurance. See SHIP AND SHIPPING.

Interest—insurable. See SHIP AND SHIPPING.

—— See WILL.

Interpleader—*indemnity: order LVII. rule* 2 (*b*)]—Wright employed a firm of auctioneers to take and sell certain goods. The auctioneers advertised the goods for sale, whereupon Thompson gave notice to them that the goods belonged to him and that he should claim the proceeds. This notice the auctioneers transmitted to Wright, and he instructed them to proceed to sell, and gave them an indemnity. They accordingly sold the goods:—*Held*, that the auctioneers had not, by taking the indemnity, disentitled themselves to relief under the Interpleader Acts. *In the matter of an Interpleader Issue between Thompson and Wright. Richardson and another, applicants*, 32

Tucker v. *Morris* (1 Cr. & M. 73; 2 Law J. Rep. Exch. 1) and *Belcher* v. *Smith* (9 Bing. 82; 1 Law J. Rep. C.P. 167) distinguished. Ibid.

—— *sheriff: money paid without a levy: trespass by sheriff: protection to sheriff: rules of court*, 1883, *order LVII. rule* 16]—A sheriff's officer went in execution of a warrant of *fi. fa.* to a shop which was stated to be the residence of the judgment debtor. It turned out that the judgment debtor was only an assistant in the shop, that he had no goods there, and that he lived elsewhere. The sheriff's officer went to an address given to him by J., the occupier of the shop and the owner of the goods in it; but he found that the debtor was not then living there. The officer returned to the shop and seized the goods in it, putting a man in possession. J. then paid under protest the amount of the judgment debt and expenses. The sheriff having received the money took out an interpleader summons:—*Held* (affirming the judgment of the Queen's Bench Division), that an interpleader issue could be directed; that the money paid under protest was the "proceeds or value" of goods "taken or intended to be taken in execution" within Order LVII. rule 1 (*b*). *Held also*, that, in the circumstances of the case, the sheriff ought to be protected from any action for seizing the goods of J., and also from any action for trespass in entering J.'s shop in order to seize them, inasmuch as J. had suffered no real grievance beyond the seizure of the goods. *Smith* v. *Critchfield. (Jenner claimant)* (App.), 366

Winter v. *Bartholomew* (11 Exch. Rep. 704; 25 Law J. Rep. Exch. 62) approved. Ibid.

—— See PRACTICE.

Judgment—final. See BANKRUPTCY NOTICE.

—— foreign. See ESTOPPEL.

—— See BANKRUPTCY; PRACTICE; ESTOPPEL.

Judgment Creditor. See CONTRACT; EXECUTION.

Judgment Debt. See BANKRUPTCY.

Jurisdiction. See BANKRUPTCY.

Jury—trial by. See PRACTICE.

Lancaster, Duchy of. See INFORMATION.

Landlord and Tenant—*action of ejectment: forfeiture: non-payment of rent: relief: terms on which granted: practice: plaintiff deprived of costs at trial: common law procedure act*, 1860 (23 & 24 *Vict. c.* 126), *s.* 1]—A defendant, against whom judgment has been obtained in an action of ejectment for non-payment of rent, in which action the plaintiff has been deprived of costs, may obtain relief after the trial, under section 1 of the Common Law Procedure Act, 1860, upon payment of all rent due and the costs of the application for relief, without being required to pay the costs of the action. *Croft* v. *The London and County Banking Co.* (App.), 277

—— *action to recover possession: sub-lessee holding over after expiration of the term: determination of lessee's title before trial: writ of possession*]—The lessee of land for a term of years demised the same for the residue of the term less three days. On the last day but one of the term granted under the original lease, the lessee issued a writ against the sub-lessee to recover possession of the land, but the action was not tried until after the determination of the lessee's title:—*Held*, upon the authority of *Gibbins* v. *Buckland* (1 Hurl. & C. 736; 32 Law J. Rep. Exch. 156), that he was entitled to judgment, and to have execution by a writ of possession, the sub-lessee not having shewn that it would be futile or unjust for the writ to issue. *Knight* v. *Clarke* (App.), 509

Landlord and Tenant (continued)—

—— *covenant: perpetual renewal: burden of proof*]—A lessor demised to a lessee certain hereditaments for three lives. The lease contained a covenant that the lessor, his heirs and assigns, upon the lessee, his heirs or assigns, "surrendering this present demise," would at any time thereafter at the request of the lessee, his heirs or assigns, as often as one or two life or lives of and in the hereditaments granted should "drop and be determined, renew, fill up, and grant a further term of and in the said premises, for any other life or two lives of any other person or persons to be nominated by" the lessee, his heirs or assigns, in the place of the life or lives so dropping or determining: the lessee, his heirs or assigns, paying to the lessor, his heirs or assigns, for every such renewal "for every life or lives of such person or persons so to be renewed as aforesaid, the sum of forty shillings only, and at the same time surrendering or delivering up this present demise to be cancelled":—*Held*, that this was not a covenant for perpetual renewal, but for renewals for three fresh lives only, with an option as to the times and mode of taking such renewals, the lessee being at liberty—first, to take three renewals of one life each on the dropping of each successive original life; or, secondly, to take a renewal for two lives on the dropping of the second, and a renewal for one life on the dropping of the third original life; or, thirdly, to take a renewal for one life on the dropping of the first, and a renewal for two lives on the dropping of the third original life. *Swinburne* v. *Milburn* (H.L.), 6

There is no legal presumption against a right of perpetual renewal, but the burden of proof is on any one claiming such a right, which will not be inferred from equivocal expressions fairly capable of another construction. Ibid.

—— *distress: agricultural holdings (England) act*, 1883 (46 & 47 *Vict. c.* 61), *ss.* 52 *and* 61: *authority to act as distress bailiff: area of authority*]—A distress was levied upon a holding to which the Agricultural Holdings (England) Act, 1883, applied, by a person having authority to act as a bailiff under the Act from a County Court Judge but not from the Judge of the County Court district where the holding was situate:—*Held*, that the enactment of section 52—that "no person shall act as a bailiff to levy any distress on any holding to which this Act applies unless . . . . authorised to act as a bailiff by . . . . the Judge of a County Court"—was satisfied by authority from the Judge of any County Court, notwithstanding the enactment of section 61 that "'County Court' in relation to a holding means the County Court within the district whereof the holding or the larger part thereof is situate." *In re Sanders; ex parte Sergeant*, 331

—— *distress for rent: liability of agisted stock to distress*: 46 & 47 *Vict. c.* 61 (*agricultural holdings act*, 1883), *s.* 45: "*fair price*"]—By section 45 of the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), a limitation is imposed on a landlord's right to distrain for rent in respect of live stock agisted on the demised premises, and if such stock has been taken in by the tenant to be fed at a fair price agreed to be paid by the owner, and it is distrained, there shall not be recovered by such distress a sum exceeding the amount of the price so agreed to be paid for the feeding; . . . and if part of such price has been *bona fide* paid to the tenant under the agreement, then the distress can only be to the full extent of the price remaining unpaid. Stock having been agisted under a *bona fide* agreement on fair terms, not involving the payment of money,—*Held*, that fair "price" meant "equivalent," and not necessarily money, and that the stock was protected under such agreement by virtue of the section. *London and Yorkshire Banking Co.* v. *Belton*, 568

—— *yearly tenancy: agreement for six months' notice to quit: agricultural holdings act*, 1883 (46 & 47 *Vict. c.* 61), *s.* 33]—A yearly tenancy where the parties have expressly agreed for a six months' notice to quit is not within the Agricultural Holdings Act, 1883, s. 33, which enacts that, "where a half-year's notice expiring with a year of tenancy is by law necessary and sufficient for determination of a tenancy from year to year, a year's notice so expiring shall by virtue of this Act be necessary and sufficient for the same." *Barlow v. Teal* (App.), 564

Decision of Divisional Court (reported *ante*, p. 400) affirmed. Ibid.

—— See ARBITRATION; DISCLAIMER; TRESPASS.

Lands Clauses Act, 1845—*compensation for house "injuriously affected": special value as a public-house*]—A railway company having in the exercise of the powers of their Act incorporating the Lands Clauses Act, 1845, stopped up a street in which was a house used as a hotel, the question of compensation was submitted to arbitration. The arbitrator found that the house, apart from its special value as a hotel and public-house, had been injuriously affected by the works of the company, and he assessed the compensation at the sum of 650*l.* He further stated by way of Special Case that the value of the house for using, selling, and letting as a hotel and public-house had been diminished to the extent of 900*l.*, and that if this depreciation in its special value was taken into account the sum to be awarded as compensation should be assessed at 1,550*l.* in-

Lands Clauses Act, 1845 (continued)—

stead of 650*l.*:—*Held*, that the owner was entitled to compensation under the Lands Clauses Act, 1845, for the depreciation in the special value of the premises as a hotel and public-house, and that he was therefore entitled to the larger sum. *In re An Arbitration between Wadham and the North-Eastern Rail. Co.*, 343

—— (8 *Vict. c.* 18), *s.* 63: *compensation: owner of land taken and of land not taken: depreciation of latter by use to be made of former*]—Part of a building estate was taken under a special Act incorporating the Lands Clauses Consolidation Act, 1845, for the purpose of a sewage farm. The remainder of the estate was thereby seriously depreciated in market value. In assessing compensation to the owner of the estate a jury awarded him, together with a sum for the value of the land taken, a sum corresponding to that depreciation:—*Held*, that there was no excess of jurisdiction in their so doing. *Reg.* v. *Essex*, 459

—— See PUBLIC HEALTH.

Law and Equity. See BILL OF SALE.

Lease—renewal of. See LESSOR AND LESSEE.

—— See DISCLAIMER; TENANCY IN COMMON.

Leeman's Act. See PRINCIPAL AND AGENT.

Lessor and Lessee. See LANDLORD AND TENANT.

Libel. See CRIMINAL LAW.

Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 42: renewal of licence: adjournment: objection. *Reg.* v. *Justices of Merthyr Tydfil* (M.C. 78), 322

Lien. See PRACTICE; SHIP AND SHIPPING; SOLICITOR AND CLIENT.

Lighterage. See SHIP AND SHIPPING.

Lighthouse—rate on. See POOR.

Limitations, Statute of. See BANKRUPTCY; LUNATIC.

Liquidator—discovery by. See PRACTICE.

Local Authority. See STREET.

Local Government. See PUBLIC HEALTH.

Lunacy. See REVENUE.

Lunatic—jurisdiction of Justices to send to an asylum: personal examination of, by Justices: 16 & 17 Vict. c. 97. s. 68. *Reg.* v. *Whitfield* (M.C. 113), 508

—— *private asylum: order for reception: statement of particulars: sufficiency of answers:* 16 & 17 *Vict. c.* 96. *s.* 4: *sched. A, form* 1: *order of discharge: "forthwith":* 8 & 9 *Vict. c.* 100. *s.* 72: *statute of limitations: married woman: tort committed during coverture: action brought subsequently:* 8 & 9 *Vict. c.* 100. *s.* 105: 21 *Jac.* 1. *c.* 16. *ss.* 3 *and* 7: *married women's property act*, 1882 (45 & 46 *Vict. c.* 75]—The statement of particulars annexed to the order issued under 16 & 17 Vict. c. 96. s. 4, and Sched. A, form 1, for the admission and detention of a patient in an asylum, forms part of such order; and such statement, if substantially accurate, will be in compliance with the Act. *Lowe* v. *Fox* (App.), 561

Where an order for the discharge of a patient has been given under 8 & 9 Vict. c. 100. s. 72, by the person who signed the order for the reception of such patient, the proprietor of the asylum is bound to discharge the patient "forthwith"—that is, as soon as practically possible under the circumstances. Ibid.

The effect of the Married Women's Property Act, 1882, is to make a married woman discovert from the date of the passing of that Act in respect of *torts* committed against her during coverture, and she is entitled to bring an action in respect of a *tort* committed during coverture and before 1882, which would otherwise be barred by 21 Jac. 1. c. 16. s. 3; for that statute begins to run only from the date of the passing of the Act of 1882. Ibid.

Machinery. See MORTGAGOR AND MORTGAGEE.

Maintenance. See PRACTICE.

Marine Insurance. See SHIP AND SHIPPING.

Market—*grant: grantee not owner of land on which market to be held: public streets: dedication of, subject to market: usage: lost grant: presumption*]—The Crown can grant the right to hold a market on land of which the grantee is not the owner at the time when such grant is made. By a charter of Charles 2 the king granted to one B., his successors and assigns, the right to hold a market on two specified days, "in or near" a certain place called Spital Square. The market was bounded by four outer streets, into which four inner streets ran from the market at right angles

Market (continued)—

to the outer streets. By certain Paving Acts of Geo. 3 the streets in the district in which the market was situate, including the outer and inner streets, were vested in certain commissioners, who, *inter alia*, had power to take proceedings against persons who obstructed the streets, and this power became vested in the Board of Works for that district by the Metropolis Management Act, 1855. The inner streets were made and dedicated to the public shortly after the grant was made, and the outer streets were made and dedicated at some time between that date and the passing of the Paving Acts. It had been the custom from time immemorial for the market to be held not only on the two days mentioned in the grant, but also on the four remaining week-days; and it had also been the custom for persons who had paid tolls to the owner of the market or his lessee for the privilege, to sell their goods in the outer streets, or as near to the market as they could get, when they were unable to do so either in the market itself or in the inner streets:—*Held*, that the grant was a grant of a market without metes and bounds, and that the grantee was entitled to hold it both in the place named and also near it wheresoever the same should honestly extend. *Held also*, that both the outer and inner streets must be taken to have been dedicated to the public, subject to the market rights of the grantee. *Held also*, that the right of the grantee to hold the market was restricted to the two days named in the grant; and that, as the origin of the right was known, there was no presumption arising from immemorial usage of a grant of a right to hold the market on the remaining week-days. *Held also*, that, notwithstanding the Paving Acts of Geo. 3, the grantee was entitled to hold the market during market hours, and could not be interfered with even though an obstruction of the streets which but for such grant would amount to a nuisance was thereby caused. *The Attorney-General (at the relation of The Whitechapel Board of Works)* v. *Horner* (App.), 227

—— loss of. See CARRIER.

Marriage. See HUSBAND AND WIFE.

Marriage Settlement. See BANKRUPTCY; HUSBAND AND WIFE.

Married Woman. See HUSBAND AND WIFE; LUNATIC.

Married Woman's Property Act. See HUSBAND AND WIFE.

Master—authority of. See SHIP AND SHIPPING.

Master and Servant—*negligence of fellow-servant: employers' liability act*, 1880 (43 & 44 *Vict. c.* 42), *s.* 1, *sub-s.* 3]—By section 1, sub-section 3, of the Employers' Liability Act, 1880, it is provided that where personal injury is caused to a workman by reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform and did conform, where such injury resulted from his having so conformed, the workman, or, in case the injury results in death, the legal personal representatives of the workman, . . . shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of the employer, nor engaged in his work. The plaintiff, a boy of fourteen, was in the service of the defendants, and acted as guard of a van driven by H., a carman, also in the defendants' employ. Inside this van were three large iron window-frames, which were placed upright in the van, and were secured in that position by two pieces of string, one piece being tied at each end round the hoops supporting the covering of the van. H. commenced unloading the frames by untying the string near the tail end of the van, and the plaintiff, who was inside at the front of the van, untied the other string. H. then pulled one of the frames away without retying the other two, leaving them standing. Directly afterwards the two frames fell upon the plaintiff, inflicting upon him severe injuries. The plaintiff stated that he untied the string at one end without any orders from H., because he, the plaintiff, had done so on other occasions, and that H. saw him untie it and made no objection. The plaintiff having sued the defendants for damages under the Employers' Liability Act, 1880,—*Held*, on the above facts, that there was evidence to go to the jury of liability on the part of the defendants under section 1, sub-section 3, of that statute. *Millward* v. *The Midland Rail. Co.* 202

—— See NEGLIGENCE.

Mayor's Court. See EXECUTION; PROHIBITION.

Measure of Damages. See CARRIER.

Metropolis—building beyond line of street: Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 75: "general line of buildings": "to be decided by the superintending architect": jurisdiction of magistrate: architect's decision. *Spackman* v. *The Plumstead District Board of Works* (M.C. 81), 422

Metropolis Local Management. See PENALTY.

Metropolitan Management Act (1882)—erection of temporary wooden structure: continuing offence: complaint: time: 45 Vict. c. 14. s. 13: 11 & 12 Vict. c. 43. *The Metropolitan Board of Works* v. *Anthony & Co.* (M.C. 39), 121

—— 1855 and 1862 (18 & 19 Vict. c. 120. s. 78, and 25 & 26 Vict. c. 102. s. 112): private drains, connection of, with sewers: right of vestry to connect house drains with sewer. *The Vestry of St. John's, Hampstead, (appellants)* v. *Hoopel (respondent)* (M.C. 147), 601

—— rating: precept to overseers, where issued: 18 & 19 Vict. c. 120. ss. 158 and 161. *Glen* v. *The Churchwardens and Overseers of the Parish of Fulham* (M.C. 9), 176

Mines. See INCOME TAX.

Misdirection. See SHIP AND SHIPPING.

Molestation. See HUSBAND AND WIFE.

Mortgagor and Mortgagee—*fixtures: machinery passing with the realty: straps conveying motive power to machinery: bills of sale act*, 1854 (17 & 18 *Vict. c.* 36)]—The owner of a manufactory mortgaged to the plaintiffs his freehold premises, with the plant, engines, and fixed machinery, including certain leather belts therein especially described. These belts passed over wheels or pulleys, and were used to impart motion to the fixed machinery which formed part of the freehold. When passed over these pulleys they were laced together. They could be slipped off the pulleys when desired, and then they hung loose, but they could not be removed from the machinery without being unlaced:—*Held*, that these belts formed an essential part of the fixed machinery, and therefore that they passed like that machinery under a mortgage of the realty, and that the deed conveying them to the plaintiffs did not require registration under the Bills of Sale Act, 1854 (17 & 18 Vict. c. 36), the Act which was in force when the mortgage deed was executed, though since repealed. *The Sheffield and South Yorkshire Permanent Building Soc.* v. *Harrison* (App.), 15

Longbottom v. *Berry* (39 Law J. Rep. Q.B. 37) approved. Ibid.

—— See FIXTURES.

Municipal Corporations—*town councillor: resignation of office: withdrawal of resignation: 45 & 46 Vict. c. 50. s. 36*]—By section 36 of the Municipal Corporations Act, 1882, "a person elected to a corporate office may at any time, by writing signed by him and delivered to the town clerk, resign the office on payment of the fine provided for non-acceptance thereof," and "in any such case the council shall forthwith declare the office to be vacant." *Reg.* v. *The Mayor &c. of Wigan*, 338

A. wrote to the town clerk resigning his office of town councillor, and enclosing the amount of the fine payable on resignation. At the next meeting of the town council the letter of resignation was read, but, on some members of the council desiring that A. should not resign, he consented to withdraw his resignation:—*Held*, that it was not competent to the council to accept the withdrawal of A.'s resignation, but that they were bound by section 36 to declare the office vacant. Ibid.

Municipal Election—*allowance of objections to the nominations of some candidates: right to petition against return of some of those elected: practice: right of appeal: municipal corporations act*, 1882 (45 & 46 *Vict. c.* 50), *ss.* 87, 93, *sub-s.* 7, *and* 242, *sub-s.* 3: *schedule III. part II. rule* 14: *judicature act*, 1881 (44 & 45 *Vict. c.* 68), *s.* 14]—Under rule 14 of schedule III. part II. of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), the decision of a mayor in allowing objections to the nominations of some of the candidates at a municipal election is subject to an appeal either by a petition questioning the whole election, or by one or more petitions questioning the return of any one or more of the candidates who were elected. If the latter course is adopted, the Court can declare the return of the particular respondent or respondents to be void without invalidating the election of the persons elected against whom no petition has been presented. *Line* v. *Warren, Checkley, and Bromwich* (App.), 201

The decision of the Queen's Bench Division affirmed. Ibid.

An appeal lies by leave of the High Court from a decision of that Court upon a municipal election petition. Ibid.

—— *objection to candidates: nomination papers: municipal corporations act*, 1882, *schedule* 3, *part* 2, *rules* 3 *and* 10: *presentation of petition not affecting whole election*]—At an election to fill four vacancies in the town council of D. the three respondents and H. were returned as duly elected. The election of the respondents was subsequently petitioned against on behalf of three other candidates, who were prevented from going to the poll owing to objections to their nominations having been allowed by the mayor. These objections were, that the persons subscribing the nomination papers had also subscribed other nomination papers of candidates at the election, although it was admitted that none of such persons had subscribed more nomination papers than there were vacancies to be filled, nor more than one nomination paper

Municipal Election (continued)—

for any one candidate. A similar objection was raised to the nomination of H., but was allowed by the mayor to be withdrawn:—*Held*, that the decision of the mayor in allowing the objection was wrong, and that a petition could be presented against the return of the three respondents without making H. a party to the proceedings. *Line* v. *Warren, Checkley, and Bromwich*, 146

Mutual Dealings. See BANKRUPTCY.

Negligence—*diversion of highway: fencing diverted road: duty arising from exercise of statutory right to divert highway: evidence of negligence: nonsuit*]—Where contractors, in the exercise of power given by the Act of Parliament authorising the construction of a railway, diverted a public footpath, substituting a new track at a certain point, but not fencing it from the old, and the plaintiff, who had passed along the diverted track in the morning, failed, while returning in the dark, to diverge at the proper point and the proper angle, and consequently was injured by falling over an unfinished bridge some distance from the place where she wrongly diverged,—*Held*, that there was evidence of negligence in the defendants which ought to have been left to the jury, on the ground that a person who had statutory powers to divert a highway was bound to make the new road so that the public might use it with reasonable safety in the dark. *Hirst* v. *Taylor*, 310

—— *master and servant: water-cart of a corporation used with hired horse and driver*]—Where the defendants, a municipal corporation, hired a horse and driver to draw a water-cart of the corporation and water the streets, the driver being directed by their inspector when and where and what streets to water, but not being otherwise under the control or superintendence of the defendants, and an injury was done to a third party by the negligence of such driver while engaged in watering a street, it was *held*, within the principle of *Quarman* v. *Burnett* (6 Mee. & W. 499), that the defendants were not liable to be sued for such injury. *Jones* v. *The Mayor &c. of Liverpool*, 345

—— *supply of defective article: injury to person using it with whom there was no contract: liability for such injury*]—The defendant delivered coals ordered by the plaintiff's employer in a truck hired from the Midland Wagon Company, who repaired it in case of serious defects, the defendant remedying slight defects. When the plaintiff got on the truck to unload it, the trap-door of the truck gave way, owing to a defect in the pin in the door, and the plaintiff, without any contributory negligence on his part, fell through and sustained damage:—*Held*, that the defendant was liable for the injury. *Elliott* v. *Hall* (sued as *The Nailstone Colliery Co.*), 518

Heaven v. *Pender* (52 Law J. Rep. Q.B. 702) distinguished. Ibid.

—— See MASTER AND SERVANT.

Newspaper. See CRIMINAL LAW.

New Trial. See PARLIAMENT; PRACTICE.

Nomination. See MUNICIPAL ELECTION.

Non-joinder. See PRACTICE.

Notice. See BANKRUPTCY; COMPANY.

Notice of Action. See PRACTICE.

Notice to quit. See LANDLORD AND TENANT.

Nuisance—*overstocking land with game: injury to crops: right of action*]—The appellants were lessees of the sporting and shooting rights over an estate a portion of which was occupied by the respondent as a tenant farmer. The appellants transferred 450 pheasants from one part of the estate to a wood situate on the respondent's farm but excluded from his occupation. The respondent's crops having been damaged by the pheasants, he brought an action in the County Court for "damages caused by the appellant's overstocking his farm with game":—*Held*, that the action was maintainable. *Farrer* v. *Nelson*, 385

Oath. See BANKRUPTCY; PARLIAMENT.

Occupation. See PENALTY.

Officer Interested. See PUBLIC HEALTH.

Official Receiver. See BANKRUPTCY.

Official Referee. See PRACTICE.

Order and Disposition. See BANKRUPTCY.

Overcharges. See RAILWAY.

Parliament—*borough vote: description of qualification: power of amendment: change in qualification: 41 & 42 Vict. c. 26. s. 28, sub-ss. 12 and 13*]—In the overseers' list for the borough of C. the nature of the appellant's

Parliament (continued)—

qualification was wrongly described as "offices successive occupation," and the qualifying property as situated in "High Street and Charles Street," whereas the appellant had occupied one set of premises only during the whole of the qualifying period in respect of which premises he was qualified to vote:—*Held*, that the misdescription was one which the Barrister should have amended under 41 & 42 Vict. c. 26. s. 28, by striking out the words "successive occupation" in column 3, and the words "and Charles Street" in column 4. *Blosse* v. *Wheatley*, 289

—— *parliamentary and municipal registration act*, 1878 (41 & 42 *Vict. c.* 26), *s.* 28, *sub-s.* 1, 12, *and* 13: *mistake of overseers: omission of qualifying premises: barrister's power to amend: change in description of qualification*]—The respondent had occupied during the whole qualifying period three houses in immediate succession. The overseers, by mistake, omitted to specify one of the houses in the description of the qualifying property, and the part only of the qualifying property as it appeared on the list was insufficient to give a vote:—*Held* (by STEPHEN, J., and CAVE, J.; *dissentiente* LORD COLERIDGE, C.J.), that the mistake was one which it was the duty of the Revising Barrister to have amended under the provisions of 41 & 42 Vict. c. 26. s. 28, by inserting the description of the omitted house. *Ford* v. *Hoar*, 286

—— *parliamentary oaths act*, 1866, *ss.* 1, 3, *and* 5: *promissory oaths act*, 1868: *penalties: voting in house of commons without making and subscribing oath: person having no religious belief: incapacity of, to take oath: practice of house of commons as to taking oath: admissibility of evidence of: trial at bar: new trial: motion for: notice: civil proceeding: appeal: judicature act*, 1873, *ss.* 19 *and* 47]—An information by the Attorney-General to recover penalties incurred under the Parliamentary Oaths Act, 1866, is not a criminal cause or matter within the meaning of section 47 of the Judicature Act, 1873, so as to preclude a defendant from appealing against the judgment of the High Court at bar. *The Attorney-General* v. *Bradlaugh* (App.), 205

A person who does not believe in a Supreme Being, and is one upon whose conscience an oath, as an oath, has no binding force, is wholly incapable of taking the oath prescribed by the Parliamentary Oaths Act, 1866, as amended by the Promissory Oaths Act, 1868. Ibid.

The oath required to be taken by section 1 of the Act of 1866, as amended by the Act of 1868, is to be taken by a member not once only in the same Parliament, but every time a member after being elected and returned takes his seat. Ibid.

Under section 3 of the Act of 1866 the oath must be taken and subscribed by a member with all the due solemnities used in Parliament, but so as no debate or business be interrupted by such member. Ibid.

Any member who takes his seat without taking the oath within the meaning of the Act is liable to the penalties imposed by the Act, even though the House of Commons itself were not only not to refuse him leave to be sworn, but were actually to pass a resolution permitting him to be sworn. Ibid.

Statements and avowals of a defendant as to his belief in a Supreme Being, and as to whether an oath, as an oath, has any binding force upon his conscience, are admissible in the trial at bar of an action for penalties under the Parliamentary Oaths Act, 1866, even though such statements or avowals were made before he was elected a member of the Parliament in which he sat and voted. Ibid.

Evidence of the usages and practice of the House is also admissible to explain the meaning of the Act and standing orders of the House with regard to making and subscribing the oath. Ibid.

Where an information to recover penalties under the Act of 1866 has been tried at bar, a motion for a new trial must not be made *ex parte*, but upon notice of motion to the other side. Ibid.

—— *registration: notice of objection: specification of list and division to which objection refers: parliamentary and municipal registration act*, 1878 (41 & 42 *Vict. c.* 26), *s.* 28, *sub-s.* 2: *schedule form I., Nos.* 1 *and* 2: *amendment*]—In the township of B., in the borough of W, there were three lists of Parliamentary voters—namely, freemen, occupiers, and lodgers. The occupiers list was the only one of these made out in divisions, being in accordance with section 15 of the 41 & 42 Vict. c. 26. Notice of objection was given to the overseers in these terms:—"I hereby give you notice that I object to the names of the persons mentioned below being retained in the B. list of persons Division I. entitled to vote at the election of a member to serve in Parliament for the borough of W.":—*Held*, that such notice, if not in form an accurate compliance with the Form (I.), No. 1, in the schedule to 41 & 42 Vict. c. 26, was such a notice and gave such information as was contemplated by the Act. The informality and inaccuracy were at any rate to be treated as a mistake, and within the powers of amendment conferred on the Revising Barrister under section 28, sub-section 2, of the same Act. *Bollen* v. *Southall*, 589

Particular Average. See SHIP AND SHIPPING.

Parties. See PRACTICE.

Partnership. See BANKRUPTCY; COMPANY.

Part Performance. See HUSBAND AND WIFE.

Pauper. See PRACTICE.

Pauper Litigant. See PRACTICE.

Payment into Court. See PRACTICE.

Penal Action. See PUBLIC HEALTH.

Penalties. See PARLIAMENT.

Penalty—*common informer: vestry: qualification: occupation: assessment to poor rate: agreement by owner of hereditaments to pay rates whether hereditaments occupied or not: metropolis local management act*, 1855 (18 & 19 *Vict. c.* 120), *ss.* 6 *and* 54*: poor rate assessment and collection act*, 1869 (32 & 33 *Vict. c.* 41), *s.* 3]—The Metropolis Local Management Act, 1855, s. 6, provides that "the vestry elected under this Act in any parish shall consist of persons rated or assessed to the relief of the poor upon a rental of not less than 40*l.* per annum; and no person shall be capable of acting or being elected as one of such vestry for any parish unless he be the occupier of a house, lands, tenements, or hereditaments in such parish, and be rated or assessed as aforesaid upon such rental as aforesaid within such parish:—*Held*, that a person is not qualified under this section unless he is the occupier of a house, &c., the rental of which is not less than 40*l.* *Mogg* v. *Clarke*, 334

Semble, in the expression "rated and assessed as aforesaid," the word "aforesaid" refers to the words "the occupier of a house, lands, tenements, and hereditaments in such parish." Ibid.

An agreement under the Poor Rate Assessment and Collection Act, 1869, s. 3, by the owner of hereditaments to pay the poor rates assessed in respect thereof, is not equivalent to the owner being rated himself. Ibid.

Personal Estate. See REVENUE.

Petition. See BANKRUPTCY; MUNICIPAL ELECTION.

Pleading. See PRACTICE.

Pledge. See BILL OF SALE; SHIP AND SHIPPING.

Policy. See SHIP AND SHIPPING.

Poor—*clerk to highway board: clerk to school board: payment of salary out of district fund:* 27 & 28 *Vict. c.* 101. *s.* 32*:* 33 & 34 *Vict. c.* 75*: election of clerk as guardian: disqualification:* 5 & 6 *Vict. c.* 57. *s.* 14]—The clerk to a highway board or a school board, whose salary is paid out of a district or school board fund, which is fed by moneys which are contributed by several parishes in accordance with precepts issued under the provisions of the Highway Act, 1864 (27 & 28 Vict. c. 101), or the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), is not disqualified, under 5 & 6 Vict. c. 57. s. 14, as being a person receiving a fixed salary from the poor rates in any parish or union, from serving as a guardian in such parish or union. *The Queen* v. *Rawlins*. *The Queen* v. *Dibbin* (App.), 557

—— derivative settlement: 39 & 40 Vict. c. 61. s. 35: "child": pauper above the age of sixteen. *Reg.* v. *The Guardians of the Poor of St. Mary, Islington; in re Alice Daris* (M.C. 110; (App.), 146), 508; (App.), 582

—— *rate: appeal against rate, condition precedent to: notice of objection to assessment committee: power of assessment committee to amend valuation list: union assessment committee acts*, 25 & 26 *Vict. c.* 103, *ss.* 18, 19, *and* 42*;* 27 & 28 *Vict. c.* 39. *s.* 1]—The "notice" mentioned in section 1 of 27 & 28 Vict. c. 39, the giving of which is a condition precedent to the power of the assessment committee to hear an objection to the valuation list and amend such list, means only the notice to be given by the objecting party to the committee, to be served in the manner prescribed by section 42 of 25 & 26 Vict. c. 103. *Reg.* v. *The Overseers of Langriville*, 124

Where, therefore, an assessment committee, having had due notice of objection to the valuation list from a railway company in respect of their assessment in a parish in the union, held a meeting to hear such objection without giving notice thereof to the overseers, and, having amended the list to the satisfaction of the company, then gave notice to the overseers to amend their current rate accordingly,—*Held*, that the assessment committee had acted within their powers, and that the overseers were bound to amend their rate in accordance with the amended list, and could not refuse to do so on the ground of not having had notice of the meeting of the assessment committee. Ibid.

—— rate: assessment: valuation: Metropolis Act (32 & 33 Vict. c. 67), ss. 46 and 47: provisional list: alteration in value: discretion of overseers as to sending in provisional list: mandamus. *Reg.* v. *The Overseers of St. Mary Magdalene, Bermondsey* (M.C. 68), 329

Poor (continued)—

—— rate: overseers: opposing private bill in Parliament: reasonable and moderate expenses: allowance by auditor. *Reg.* v. *Sibly* (M.C. 23), 257

—— *rate: rateability of lighthouse: telegraph station: receipts limited by statute to amount of conservancy expenditure: rateability of adjoining houses: principle on which their value should be estimated*]—The Mersey Docks and Harbour Board have by statute the right to levy certain harbour and light dues; but these dues are so fixed that with the other receipts applicable to conservancy purposes the receipts must not exceed the expenditure on those purposes, so that no profit can accrue to the Board in respect of lighthouses. The board own as part of their conservancy apparatus a tower which is used as a lighthouse and a telegraph station, and they also own certain houses near to this tower which are inhabited by light-keepers and workmen as servants of the board:—*Held*, that the board were not liable to be rated in respect of the tower, inasmuch as the use of it was so limited by statute that no profit could arise therefrom, and therefore that there could be no beneficial occupation of it by any tenant; but that they were liable to be rated in respect of the adjoining houses, and that in estimating the value of these houses the fact of their proximity to the lighthouse tower ought to be taken into account. *The Mersey Docks and Harbour Board* v. *The Overseers of the Parish of Llanelian* (App.), 49

—— rate: rateable occupation: telephone company: overhead wires supported by houses. *The Lancashire and Cheshire Telephone Exchange Company (Limited)* v. *The Overseers of Manchester* (M.C. 63), 398

—— settlement: divided parishes and poor law amendment act, 1876 (39 & 40 Vict. c. 61), s. 34: residence of young children away from parents: intention of parent as to children's residence: settlement by residence. *The Guardians of the Holborn Union* v. *The Guardians of the Chertsey Union* (M.C. 53), 191

—— settlement: residence: 39 & 40 Vict. c. 61. s. 34. *Reg.* v. *The Guardians of Stepney Union* (M.C. 12), 91

—— valuation list: appeal against second rate: objection to valuation list: union assessment committee amendment act, 1864 (27 & 28 Vict. c. 39), s. 1. *Reg.* v. *The Justices of Denbighshire* (M.C. 142), 577

Possession—writ of. See LANDLORD AND TENANT.

Power of Attorney. See BANKRUPTCY.

Practice—*action: trial by judge with jury: order XXXVI. rules* 4, 6, *and* 7]—A party who desires that an action shall be tried with a jury must obtain an order to that effect; and if the case falls within Order XXXVI. rule 6, the Master has no discretion, but must make the order. *Trower* v. *The Law Life Assurance Soc.* (App.), 407

—— *action under the employers' liability act (43 & 44 Vict. c. 42), s. 6: removal of, into high court: stay of proceedings in county court: 19 & 20 Vict. c. 108. s. 39*]—The Employers' Liability Act (43 & 44 Vict. c. 42), which provides by section 6 that actions brought under it shall be brought in a County Court, but may be removed by either party into a superior Court in like manner and upon the same conditions as an action commenced in the County Court may be removed, does not so incorporate all the provisions of the County Courts Act, 1856 (19 & 20 Vict. c. 108. s. 39), as to entitle the defendant, when an action is brought claiming more than 5*l.*, to give notice that he objects to the action being tried in the County Court, to give security, and thereupon to have all the proceedings in the County Court stayed. *Reg.* v. *The Judge of the City of London Court and Claxton and Maskell* (App.), 330

Judgment of the Queen's Bench Division (*ante*, p. 301, *sub. nom. Claxton* v. *Lucas and Aird*) affirmed.

—— *affidavits: award: power to extend time: irregularity: order LII. rule 4: order LXIV. rule 7: order LXX. rule* 1]—A notice of motion to set aside an award, which would expire on the last day of the sittings next after such award, was served without any copy of the affidavit in support of the application:—*Held*, that though the Court may not have power to enlarge the time for making the application under Order LXIV. rule 7, there is power under Order LXX. rule 1 to hear the application, although the time has expired, if the Court deem fit. *In re Arbitration between the Chaplain &c. of Wiggeston Hospital and Stephenson*, 248

Hampden v. *Wallis* (Law Rep. 26 Ch. D. 746) followed. Ibid.

—— *costs: action remitted to the county court for trial: rules of court, 1883, order LXV. rules* 1 *and* 4]—Order LXV. rule 4 of the Rules of the Supreme Court, 1883, provides that where an action is ordered to be tried in a County Court under the provisions of 19 & 20 Vict. c. 108. s. 26, "the costs of the action shall, subject to the provisions of the principal Act and these rules, follow the event, unless by the Registrar's certificate of the

Practice (continued)—

result of the trial it shall appear that the Judge before whom the action was tried was of opinion that the question of costs ought to be referred to a Judge of the High Court, in which case no costs shall be recovered unless ordered by the Court or a Judge":—*Held* (reversing the judgment of the Queen's Bench Division), that the High Court has jurisdiction over the costs of an action remitted for trial to a County Court and tried before the Judge, even though the Registrar's certificate does not contain any certificate under Order LXV. rule 4 that the Judge was of opinion that the question of costs ought to be referred to the High Court, and although the Judge has made no order as to costs. *Emeny* v. *Sandes* (App.), 82

—— *costs: order LXV. rule* 12*: breach of promise of marriage: taxation: verdict for* 20*l.*]—Rule 12 of Order LXV., providing that where in actions founded on contract brought in the High Court a plaintiff recovers a sum between 20*l.* and 50*l.* he shall be entitled to costs on the County Court scale only, does not apply to an action for breach of promise of marriage, inasmuch as it could not have been commenced in the County Court. *Saywood* v. *Cross*, 17

—— *costs: reference of action and all matters in difference: costs to abide event: "event" construed distributively*]—When on a reference of a cause and all matters in difference the submission provides that the costs of the cause and of the reference are to abide the event, the word "event" is to be construed distributively, and each party will be entitled to the costs of those matters on which he succeeds. An action, with all matters in difference, was referred to an arbitrator upon the terms that the costs of the action, the reference, and award were to abide the event. The arbitrator awarded the plaintiff a sum of 293*l.* in respect of the claim in the action, and in respect of other matters in difference not included in the original action he directed that the plaintiff should do certain things:—*Held*, that the word "event" ought to be construed distributively, and that the plaintiff would be allowed the general costs of the action, and the defendant the costs of such matters in difference as he had succeeded on. *Hawke* v. *Brear*, 315

Ellis v. *Desilva* (50 Law J. Rep. Q.B. 328; Law Rep. 6 Q.B. D. 521) followed. Ibid.

Gribble v. *Buchanan* (18 Com. B. Rep. 691; 26 Law J. Rep. C.P. 24) not followed. Ibid.

—— *costs: reference: costs to abide event: claim and counter-claim arising out of contract: counter-claim exceeding claim: award for balance: event: apportionment of costs of issues*]—Where in an action which was referred to arbitration—costs of the cause and of the reference and award to follow the event—the amount found to be due on a counter-claim arising out of contract exceeded the amount found to be due on a claim also arising out of contract, and the arbitrator awarded that the plaintiff should pay the balance due to the defendant,—*Held*, that the defendant was entitled to the costs of the cause and of the reference and award, but that the plaintiff was entitled to the costs of those issues upon which he had succeeded; and that judgment should be entered accordingly. *Lund* v. *Campbell* (App.), 281

—— *costs: third counsel in court of appeal: solicitor and client: sanction of client: failure of solicitor to warn client of probable disallowance*]—Where a solicitor retains a third counsel on the argument of an appeal with the client's sanction, but without warning him that the costs will probably be disallowed on taxation if he be successful, the solicitor cannot recover the counsel's fee. *In re Broad and Broad* (App.), 573

—— *county court: visible means: security for costs: remitted action:* 30 *&* 31 *Vict. c.* 142. *s.* 10]—A plaintiff who has no such means of paying the costs of an action as can fairly be ascertained by a reasonable person in the position of the defendant, has no "visible means" within the meaning of section 10 of the County Courts Act, 1867. *Lea* v. *Parker* (App.), 38

The jurisdiction of the Judge to make an order under section 10 only arises when an affidavit has been made by the defendant, and the Judge, in exercising his discretion as to whether he will make an order or no, must satisfy himself whether the plaintiff has any means of paying the costs of the action, and not merely whether he has any "visible means." Ibid.

Counsel v. *Garvie* (Ir. Rep. 5 C.L. 74) commented on. Ibid.

—— Court of Appeal: Case stated: Baines's Act (12 & 13 Vict. c. 45), s. 11: right to appeal without leave: Judicature Act, 1873, s. 19: poor law: removal: settlement of children. *The Guardians of the Holborn Union* v. *The Guardians of the Chertsey Union* (M.C. 137), 570

—— *cross-judgments in distinct actions: set-off: lien of solicitor: rules of court*, 1883, *order LXV. rule* 14*; rule* 27, *clause* 37]—Whether rule 14 of Order LXV. of the Rules of Court, 1883, does or does not apply to the case of cross-judgments in distinct actions between the same parties, the allowing a set-off for damages or costs between parties is a matter in the discretion of the Court. *Edwards* v. *Hope* (App.), 379

A plaintiff sued for the price of goods; the de-

Practice (continued)—

fendant alleged that the time of credit had not expired, and judgment was entered for her, her costs being taxed at 48*l.* 8*s.* 10*d.* The plaintiff sued again after the time of credit had expired, and recovered judgment for 57*l.* 14*s.* 4*d.*, the price of the goods, and for costs, which were taxed at 12*l.* 5*s.* 8*d.*:—*Held*, affirming the judgment of the Queen's Bench Division, that the plaintiff ought only to be allowed to set off the amount of the costs of the second action against the costs due by him to the defendant in the first action, so as to preserve the lien of the defendant's solicitor on the costs recovered by her in the first action. Ibid.

—— *discovery of documents: privileged documents: documents privileged in former actions by same plaintiff but against different defendant: continuance of privilege*]—Documents prepared by the solicitor in an action by P. against D. for use in the conduct of that action, being documents which came into existence for the purpose of private and confidential communications in that action, were privileged in that action from production:—*Held* (affirming the judgment of the Queen's Bench Division), that these documents were also privileged from production in an action by the same plaintiff against a different defendant, and that as the documents had been once privileged the fact that the enquiry about them was raised in a different action from that in which the privilege originally arose did not destroy the privilege. *Pearce* v. *Foster* (App.), 432

Bullock v. *Corrie* (47 Law J. Rep. Q.B. 332) approved. Ibid.

—— *dismissing action as frivolous and vexatious: order XXV. rule 4: action by bankrupt for maliciously procuring adjudication: maintenance: corporation in liquidation*]—No action can be brought by a bankrupt for maliciously procuring his adjudication so long as the adjudication itself has not been set aside. *The Metropolitan Bank (Lim.) and Cooper (the liquidator thereof)* v. *Pooley* (H.L.), 449

Witworth v. *Hall* (2 B. & Ad. 695) followed. Ibid.

Such an action may be dismissed as frivolous and vexatious on summons under Order XXV. rule 4. Ibid.

A bankrupt cannot recover in an action for maintenance committed in relation to the proceedings for procuring his adjudication—since the cause of action must have arisen, if at all, before the bankruptcy, and the right to sue must therefore have passed to the trustee. Ibid.

Per EARL OF SELBORNE, L.C.—A corporation in liquidation, as distinct from the liquidator thereof, is incapable of maintenance. Ibid.

Order XXV. rule 4 enables the Court to deal in an easy and summary manner with demurrable actions, and also affirms the inherent power of the Court to protect itself from the abuse of its procedure by the bringing of frivolous and vexatious actions. Ibid.

—— fee on entering rule *nisi*: order as to Supreme Court fees, 1884, schedule 52. *Ex parte Hasker* (M.C. 94), 422

—— *inspection of documents: company: documents in possession of liquidator after dissolution: action on joint and several promissory note made by directors*]—One of several defendants stated in his affidavit of documents that certain documents were in his possession or power, but that he had no property in them. The affidavit further stated that he objected to produce them, on the ground that he originally had the custody of them as the liquidator appointed in the winding-up of a company. The liquidation proceedings had come to an end, the company had been dissolved before the commencement of an action on a joint and several promissory note made by the defendants as directors of the company to secure repayment of any sums which might become due from the company to the plaintiffs:—*Held*, that the plaintiffs were entitled to an order on the defendant to produce the documents for inspection, as he was a person who, being bound under section 155 of the Companies Act, 1862, to keep the same for a period of five years from the date of the dissolution of the company, had an absolute control over them. *The London and Yorkshire Bank* v. *Cooper* (App.), 495

—— *interpleader: summary decision: appeal: leave of court or judge: order LVII. rules 8 and 11: common law procedure act*, 1860 (23 & 24 *Vict. c.* 128), *s.* 17: *appellate jurisdiction act*, 1876 (39 & 40 *Vict. c.* 59), *s.* 20]—In view of section 20 of the Appellate Jurisdiction Act, 1876, and section 17 of the Common Law Procedure Act, 1860, even when read with Order LVII. rule 11, there is no appeal from the High Court to the Court of Appeal upon a summary disposal of a claim in interpleader under Order LVII. rule 8, with or without leave to appeal being given. *Waterhouse and Co.* v. *Gilbert* (App.), 440

—— *interpleader issue: judgment or order at trial: appeal: leave: judicature act*, 1873, *s.* 19]—An appeal lies, without leave, under section 19 of the Judicature Act, 1873, from the judgment of a Judge upon the interpleader issue with respect to the findings in the facts or a ruling on a point of law; although an appeal will not lie, without leave, from the final determination of the interpleader proceedings under Order LVII. rule 13. *Fox* v. *Smith (Dawson, claimant)*, (App.), 299

Practice (continued)—

—— Justice of the peace: rule to a Justice under Jervis's Act (11 & 12 Vict. c. 44), s. 5: mandamus to hear application for summons: concurrent remedies: applicant in person. *Reg.* v. *Biron and others* (M.C. 77), 389

—— *lapse of one year since the last proceeding: notice of intention to proceed: judgment by default: rules of court*, 1883, *order LXIV. rule* 13]—Where in an action there has been no proceeding for one year from last proceeding had, a plaintiff who desires to sign judgment must give to the defendant a month's notice of his intention to proceed, even though the defendant did not enter an appearance to a specially indorsed writ issued and served by the plaintiff. *Webster* v. *Myer* (App.), 101

—— *new trial: action remitted to county court: mode of appeal: rules of the supreme court*, 1883, *order XXXIX. rules* 3 *and* 4: *order LXXII. rule* 2]—Rules 3 and 4 of Order XXXIX. of the Rules of the Supreme Court, 1883, have no application to motions for new trial in actions remitted to the County Court for trial under 19 & 20 Vict. c. 108. s. 26. *Pritchard* v. *Pritchard*, 30

In such actions a motion for new trial must still be made within the time limited by the old practice. Ibid.

—— *objection for want of parties: rules of court*, 1883, *order XVI. rule* 11: *stay of proceedings*]—Under Order XVI. rule 11 of the Rules of Court, 1883, no person can be added as a plaintiff to an action without his written consent. The plaintiff brought an action upon a contract against the defendant, who insisted that one L. should be joined as a co-plaintiff as being a party to the contract, or, in the alternative, that all proceedings in the action should be stayed until he was so joined:—*Held*, that inasmuch as L. had not consented to have his name added as a co-plaintiff, the Court had no right by a round-about process to make an order which would practically override the provisions of Order XVI. rule 11. *Jackson* v. *Krüger*, 446

—— *payment into court with denial of liability: discontinuance: taxation of costs: rules of court*, 1883, *order XXII. rules* 6 *and* 7: *order XXVI. rule* 1]—In an action for breach of contract, in which the plaintiffs alleged several distinct breaches, the defendants, while denying all liability, paid into Court in the alternative a sum by way of satisfaction of one alleged breach. The plaintiffs took out the sum so paid in, and gave notice that they accepted the same in full satisfaction of the causes of action in the statement of claim mentioned:—*Held*, that what the plaintiffs had done was equivalent to a discontinuance, that they were entitled to tax their costs under Order XXII. rule 7, and that it was not necessary for them also to give notice of discontinuance under Order XXVI. rule 1. *McIlwraith* v. *R. and H. Green* (App.), 41

—— *power to abridge time appointed: notice of trial: order XXXVI. rule* 12; *LXIV. rule* 7]—The lapse of the six weeks from the close of the pleadings allowed by Order XXXVI. rule 12 to a plaintiff is a condition precedent to the exercise by a defendant of the power to give notice of trial under that order; and the Court cannot give the defendant leave to exercise that power before the expiration of the six weeks, which period is not a "time appointed by the rules" within Order LXIV. rule 7. *Saunders* v. *Pawley*, 199

—— *reference of dispute to arbitration: condition precedent to right to sue: railway passengers' assurance company's act*, 1864 (*27 & 28 Vict. c.* CXXV.), *ss.* 3, 16, *and* 33]—The Railway Passengers' Assurance Company's Act, 1864, provides by section 3 that any question arising on any contract of insurance shall, if either party require it, be referred to arbitration, and by section 16 that if there be any question or difference as to the liability of the company, it shall, if either the company or the persons claiming require it, and as a condition precedent to the enforcing of any claim to which the question or difference relates, be referred to arbitration. Section 33 provides that if any policy holder or his representatives begin any action against the company in respect of the matters to be referred to arbitration under the provisions of the Act, the Court or a Judge, on application by the company after appearance, "upon being satisfied that no sufficient reason exists why the matters cannot be or ought not to be referred to arbitration, and that the company were, at the time of the bringing of the action or suit, and still are, ready and willing to concur in all acts necessary and proper for causing the matters to be decided by arbitration," may make an order staying all proceedings in the action or suit. The representatives of a policy-holder in the company made a claim against the company. The company disputed it, but did not give notice that they required the question to be referred to arbitration. The claimants then brought an action, whereupon the company took out a summons to stay proceedings in the action:—*Held*, that the provisions of sections 3 and 16 apply to cases in which a reference to arbitration is required before an action is begun; that section 33 applies to cases in which an action has been begun before a reference is asked for, and that in such cases the party claiming has a right to bring an action, and that it must then be a question of discretion

Practice (continued)—

in each case whether the action ought or ought not to be stayed. *Fox* v. *The Railway Passengers' Assurance Co.* (App.), 505

Hodgson v. *The Railway Passengers' Assurance Company* (Law Rep. 9 Q.B. D. 188) explained. Ibid.

—— *security for costs: party out of jurisdiction: actor on counter-claim: cross-action*]—When a defendant out of the jurisdiction sets up a counter-claim which amounts to an independent action, and the plaintiff discontinues the action, the defendant may be ordered to give security for the costs of the counter-claim. *Sykes* v. *Sacerdoti* (App.), 560

—— *service of writ out of jurisdiction: action for rent: order XI. rule* 1 (*b*) (*e*): *defendant domiciled in Scotland*]—The writ of summons in an action for the recovery of rent due under a lease of premises situate within the jurisdiction may not be served on a defendant domiciled in Scotland, because the action is one within Order XI. rule 1 (*e*), in which case service of the writ may not be allowed on a defendant domiciled or ordinarily resident in Scotland or Ireland. *Agnew* v. *Usher*, 371

—— *service of writ of summons: foreign corporation: order IX. rule* 8: "*officer*": "*clerk*"]—The defendant company, having head offices in Paris, Bordeaux, and Marseilles, had agents and correspondents, among other places, in London. Service of a writ of summons on an agent in London was set aside on the ground that it was not service on the "head officer, clerk, treasurer, or secretary of such corporation," within Order IX. rule 8. *Walter Nutter & Co.* v. *Messageries Maritimes de France*, 527

—— "*special referee*": *consent of parties*: "*official referee*": "*upon such terms as may be thought proper*": *costs: judicature act*, 1873 (36 & 37 *Vict. c.* 66), *ss.* 56 *and* 57: *order XXXVI. rule* 7*a*]—The Court or a Judge has no power to refer any cause or matter to a special referee without the consent of the parties thereto. Where one of the parties to a cause objected to a reference to a special referee, the Judge, in ordering the cause to be tried by an official referee, ordered that "the extra costs occasioned by a trial before an official referee instead of a special referee be reserved":—*Held*, that the Judge had jurisdiction to insert these terms in the order. *The London and Lancashire Fire Insur. Co.* v. *The British American Assoc.*, 302

—— *special venue: notice of action: constables: extent of special constables' privileges conferred on county constables:* 1 & 2 *Will.* 4. *c.* 41. *s.* 19: 2 & 3 *Vict. c.* 93. *s.* 8: *contagious diseases* (*animals*) *act*, 1878 (41 & 42 *Vict. c.* 74)]—Constables appointed under the County Constables Act (2 & 3 Vict. c. 93), to whom in virtue of section 8 all the provisions of the Special Constables Act (1 & 2 Will. 4. c. 41) are to be "deemed to extend," have the privilege of special venue and notice of action conferred by section 19 of the Special Constables Act on "persons acting in the execution of this Act" only when acting in the execution of the Special Constables Act, and not when acting in the execution of other Acts, *e.g.* the Contagious Diseases (Animals) Act, 1878. *Bryson* v. *Russell* (App.), 144

—— *statutory costs: double costs:* 8 & 9 *Vict. c.* 100. *s.* 105: *order LXV. rule* 1]—Order LXV. rule 1 does not apply to costs which are given by a statute as a matter of right. *Hasker* v. *Wood* (App.), 419

In an action brought for anything done in pursuance of 8 & 9 Vict. c. 100, a successful defendant is entitled to double costs as a matter of right. Ibid.

—— *stay of execution for costs: appeal to the house of lords: special circumstances*]—The Court will not stay execution for costs, pending an appeal to the House of Lords, upon payment into Court of the amount, without the inability of the respondent to repay the amount or other special circumstances being shewn. *Barker* v. *Lavery* (App.), 241

—— *taxation of costs: party litigating as a pauper: allowance of costs to, when successful: rules of court*, 1883, *order XVI. rules* 24 *to* 31; *order LXV.*]—A party who is admitted to sue or defend as a pauper is entitled, if successful after trial with a jury, no special order having been made by the Court or Judge, to be allowed on taxation such costs as he has become liable to pay. He will therefore be allowed his solicitor's costs out of pocket, but not counsel's fees or solicitor's profits. Affirming the Queen's Bench Division, *ante*, p. 312. *Carson* v. *Pickersgill* (App.), 484

—— writ of mandamus: return of obedience: right to plead to: 9 Anne, c. 25, Revised Statutes, c. 20, *Ruff.*: 46 & 47 Vict. c. 49: Rules of Court, 1883, Order LIII. rule 9; Order LXVIII. rule 1; Order LXXII. rule 2. *Reg.* v. *The Justices of Staffordshire* (M.C. 17), 173

—— See BANKRUPTCY; LANDLORD AND TENANT.

Preference—undue. See RAILWAY.

—— See COMPOSITION DEED.

Prescription Act. See EASEMENT.

Principal and Agent—*stockbroker: purchase of bank shares: omission to specify numbers: void contract: payment by stockbroker on foot of void contract under pressure of rules and regulations of stock exchange: Leeman's Act* (30 & 31 *Vict. c.* 29), *s.* 1]—The plaintiffs, who were stockbrokers and members of the London Stock Exchange, having, at the request of the defendant, purchased upon the Stock Exchange certain bank shares, which the defendant afterwards refused to accept and pay for, on the ground that there was no valid contract of sale of the shares by reason of the provisions of Leeman's Act (30 & 31 Vict. c. 29), were obliged, in accordance with the rules and regulations of the Stock Exchange, and to avoid expulsion from the Stock Exchange, to complete the purchase of and pay for the bank shares:—*Held*, that the plaintiffs having been employed to act for the defendant according to the specific rules and regulations of the Stock Exchange, were entitled to recover from the defendant the price of the bank shares, together with commission, &c., as for money paid and work done by them for the defendant. *Seymour* v. *Bridge*, 347

Read v. *Anderson* (53 Law J. Rep. Q.B. 532; Law Rep. 13 Q.B. D. 779) followed. Ibid.

—— *contract for purchase of bank shares: contract void under* 30 *Vict. c.* 29. *s.* 1: *custom of stock exchange: ignorance of, on part of principal: liability of principal to indemnify agent*]—A principal who employs a stockbroker to purchase bank shares for him is not bound by the custom of the Stock Exchange to disregard the provisions of Leeman's Act (30 Vict. c. 29. s. 1) if he is in fact ignorant of the custom: for a custom must, in order to bind a person who is ignorant of it, be reasonable, and it must not change the character of the contract directed to be entered into. *Perry* v. *Barnett* (App.), 466

The defendant directed the plaintiffs, who were stockbrokers at Bristol, to buy for him on the London Stock Exchange certain bank shares. The plaintiffs bought the shares through their London agents, and sent the defendant the contract-note, which, according to the usage and practice on the Stock Exchange, did not contain the numbers of the shares, as required by 30 Vict. c. 29; and the defendant refused for that reason to accept or pay for the shares. By the rules of the Stock Exchange, a member who does not fulfil his contracts is expelled, and no application to annul a contract is entertained unless fraud or misrepresentation is alleged. The London brokers accordingly paid for the shares, and the Bristol brokers repaid them and sued the defendant to recover the money thus paid. The defendant did not know of the custom to disregard the provisions of 30 Vict. c. 29 which makes a contract not made in accordance with it void:—*Held*, that the plaintiffs were not entitled to recover the money paid, as the defendant did not in fact know of the custom; that knowledge of a custom which was not reasonable could not be imputed to him; and that what he had authorised the plaintiffs to do was to make a valid contract, and not one which could not be enforced in law. Ibid.

Decision of GROVE, J. (*ante*, p. 351) affirmed. Ibid.

—— *contract: wagering: agent commissioned to make bets: right of principal to recover money so received by agent:* 8 *&* 9 *Vict. c.* 109. *s.* 18]—The plaintiff employed the defendant to make bets for him upon commission. The defendant having done so received from the losers money in respect of bets so made which were won by him. The plaintiff claimed this money from the defendant, but the defendant refused to pay it on the ground that it was money won upon a wager, and therefore that the plaintiff could not recover, in consequence of the provisions of 8 & 9 Vict. c. 109. s. 18:—*Held*, that the plaintiff was entitled to recover; that the defendant had received the money for the use of the plaintiff; that the provisions of 8 & 9 Vict. c. 109. s. 18 only apply to the original contract between the two persons who make a bet, and that they do not make void a contract such as that which the plaintiff had made with the defendant. *Bridger* v. *Savage* (App.), 464

Beeston v. *Beeston* (45 Law J. Rep. Exch. 230) approved. Ibid.

Beyer v. *Adams* (26 Law J. Rep. Chanc. 841) overruled. Ibid.

—— See COMPANY.

Priority. See COMPANY.

Privilege. See PRACTICE.

Probate Duty. See REVENUE.

Profits. See INCOME TAX.

Prohibition — *jurisdiction: cause of action: mayor's court act* (20 *&* 21 *Vict. c.* clvii.), *s.* 12]—An agreement for the sale of a lease and the goodwill of a business in Surrey was made orally between the parties. Afterwards the terms so agreed upon were put into writing, the document being drawn up in duplicate. One counterpart was signed by the defendant outside the jurisdiction, and the other subsequently signed by the vendor within the jurisdiction of the Mayor's Court, where the deposit was paid, and where the documents were also exchanged. The vendee, having failed to pay 50*l.*, balance of the purchase-

Prohibition (continued)—

money, was sued in the Mayor's Court by the vendor:—*Held*, that, on the signature by the defendant, the plaintiff's cause of action was complete; that no part, therefore, of the cause of action arose within the jurisdiction, and that a writ of prohibition must issue. *Alderton* v. *Archer*, 12

—— *Salford hundred court: jurisdiction: Salford hundred court of record act*, 1868 (31 & 32 *Vict. c.* cxxx.), *s.* 7]—A defendant in an action in the Salford Hundred Court who has not objected to the jurisdiction of that Court in his defence, as provided by section 7 of the Salford Hundred Court of Record Act, 1868, cannot after judgment has been recovered against him in that Court obtain a writ of prohibition on the ground of want of jurisdiction. *Chadwick* v. *Ball* (App.), 396

Oram v. *Breary* (46 Law J. Rep. Exch. 481; Law Rep. 2 Ex. D. 346) overruled. Ibid.

—— See EMPLOYERS' LIABILITY ACT.

Proof. See BANKRUPTCY.

Prosecution. See CRIMINAL LAW.

Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 179, 180, *and* 308: *compensation for damage sustained by the exercise of the powers of the act: arbitration: dispute as to liability and as to amount: order in which questions are to be decided*]—A person who claims compensation for damage sustained by reason of the exercise of the powers of the Public Health Act, 1875, is entitled under section 308 to have the amount of compensation determined by arbitration in the manner provided by that Act, even though a dispute exists as to the liability of those from whom he seeks to recover compensation; and the prior determination of that question of liability is not a condition precedent to the claimant's right to go to arbitration to settle the amount. *The Brierley Hill Local Board* v. *Pearsall* (H.L.), 25

—— (38 & 39 *Vict. c.* 55), *ss.* 174 *and* 193: *local government: contract with urban authority for amount exceeding* 50*l.*: *contract not under seal: confirmation under seal before completion of contract: officer of local authority interested in contract made with local authority: validity of contract*]—It is competent for an urban authority, honestly and for the advantage of their district, to confirm under their seal a previous contract not under seal for an amount exceeding 50*l.* before such contract is completely executed, so as to render the contract valid within section 174 of the Public Health Act, 1875. *Melliss* v. *The Shirley and Freemantle Local Board of Health*, 408

A contract not under seal, made by an urban authority, whereof the value or amount in fact exceeds 50*l.*, is invalid by reason of section 174 of the Public Health Act, 1875, notwithstanding that at the time of entering into the contract it was uncertain what would be the value or amount of the contract when executed. Ibid.

Eaton v. *Basker* (50 Law J. Rep. Q.B. 444; Law Rep. 7 Q.B. D. 529) distinguished. Ibid.

A contract made with a local authority is not rendered void under section 193 of the Public Health Act, 1875, by reason that an officer or servant of the local authority is concerned or interested in the contract. Ibid.

—— (38 & 39 *Vict. c.* 55), *ss.* 150 *and* 174: *local government: sewering, &c., street: liability of owner of premises abutting on street: work done by urban authority under contract: contract not under seal*]—It is no defence to an action by an urban authority to recover from an owner in default under section 150 of the Public Health Act, 1875, his proportion of expenses of paving, &c., a road, that the work was done for the authority under a contract exceeding in amount 50*l.*, and that such contract was not under seal as required by section 174 of the Act. *The Bournemouth Commissioners* (*The Urban Sanitary Authority for the District of Bournemouth*) v. *Watts*, 93

—— (38 & 39 Vict. c. 55), s. 150: paving street: apportionment of expenses: premises separated from street by wall: land "fronting, adjoining, or abutting on street." *Lightbound* v. *The Higher Bebington Local Board* (M.C. 130), 539

—— (38 & 39 *Vict. c.* 55), *s.* 193: *penal action: officer of board: "interested in" a contract: shareholder in contracting company*]—A clerk to a district local board under the Public Health Act, 1875, who is a shareholder in a gas company which supplies gas in the district at so much a lamp paid by the local board pursuant to a resolution of the board, is an officer "interested in" a contract made with the board for the purposes of the Act, and is liable to penalties under section 193 of the Act. *Todd* v. *Robinson* (App.), 47

—— (38 & 39 Vict. c. 55), ss. 116 and 117: meat seized and condemned as unsound: liability of owner to penalty: evidence that meat was wrongly condemned. *Waye* v. *Thompson* (M.C. 140), 603

Public Policy. See CONTRACT.

Quit—notice to. See LANDLORD AND TENANT

Railway Company—*carrier: contract: effect of conditions and time bills: exemption from liability: through communication: want of punctuality: damages*]—The plaintiff took four third class tickets at the defendants' station at Durham by the 2.11 p.m. train for Belfast *via* Leeds, Midland, and Barrow, which was printed on the tickets, and it was further stated that they were "issued subject to regulations in time table." At the end of the time bills there were a number of pages entitled "Connection with other railways," and one of such pages was printed "Through communication between the North-Eastern Line and Ireland, Belfast *via* Leeds and Barrow," from which it appeared that the 2.11 p.m. train should arrive at Leeds at 4.45, and leave there at 5.10 by the Midland Company's line. The Midland Company's station at Leeds adjoins the North-Eastern station, but is a separate building. The train by which the plaintiff and his family travelled did not reach Leeds till 5.22, or thirty-seven minutes late, and the Midland Company's train having left at the proper time, the plaintiff's family were unable to proceed to Belfast that night, and were compelled to put up at an hotel at Leeds. The conditions in the defendants' time tables comprised the following:—"The hours stated in these time tables are appointed as those at which it is intended, as far as circumstances will permit, the passenger trains should arrive at and depart from the several stations; but their departure or arrival at the times stated, or the arrival of any train passing over any portion of the company's lines in time for any nominally corresponding train on any other portion of their lines, is not guaranteed; nor will the company, under any circumstances, be held responsible for delay or detention, however occasioned, or any consequences arising therefrom. The issuing of tickets to passengers to places off this company's lines is an arrangement made for the greater convenience of the public; but the company will not be held responsible for the non-arrival of this company's own trains in time for any nominally corresponding train on the lines of other companies, nor for any delay, detention, or other loss or injury whatsoever which may arise therefrom, or off their lines." In an action brought in the County Court to recover the expenses to which the plaintiff had been put by an alleged breach of contract on the part of the defendants, the County Court Judge held that there was an implied contract that the defendants would use reasonable efforts to ensure punctuality, and that the defendants had failed to shew that the delays arose from no want of reasonable efforts; accordingly he gave judgment for the plaintiff for the amount claimed:—*Held*, upon appeal to the Divisional Court, that the judgment given in the County Court must be reversed, inasmuch as the conditions formed part of the contract, and the true construction of such conditions was that the defendants refused to guarantee the punctuality of their trains according to the times mentioned in the tables, from whatever cause the irregularity or want of punctuality might arise. *McCartan* v. *The North-Eastern Railway Co.*, 441

—— *contract to carry by special train and boat: "wind, weather, and tide permitting": notice of special purposes: measure of damage: loss of market: deterioration*]—Two consignments of fish for transport by special train and tidal boat from London *viâ* Folkestone to Boulogne were made to a railway company who advertised special trains and boats at special rates subject to the conditions contained in their tables. One of these conditions was that the company would not be answerable for loss occasioned by the trains or boats not starting or arriving at the time specified; and another that the boats started "wind, weather, and tide permitting." In each case, on arrival at Folkestone, it was found that it was not prudent to load the fish on the tidal boat owing to the state of the weather, and the fish had to be sent in the cargo boat, in consequence of which the Paris train at Boulogne was missed and the fish delayed for twenty-four hours, and deteriorated, besides losing the market:—*Held*, that there was no absolute guaranty that the fish would go by that particular train and boat, but that it was for the jury to say whether under the circumstances the defendants had been guilty of negligence or whether they had substantially fulfilled their contract. *Held also*, that, in estimating the damages, the loss of the market in Paris by the non-arrival of the fish at Boulogne in time to catch the train for Paris was not to be taken into account. *Hawes & Son* v. *The South Eastern Rail. Co.*, 174

—— *"passenger trains": contract with landowner to stop*]—A proprietor of land in Scotland granted to a railway company at a nominal feu rent a piece of ground for the erection of a station at C. The feu charter contained a provision that all "passenger trains" should regularly stop at the station to be erected. The company subsequently claimed the right to run through without stopping trains of the following three descriptions:—1. Special excursion trains not advertised as running regularly in the company's time tables; 2. Trains known as Queen's Messenger trains; 3. Trains known as Post Office trains. Queen's Messenger and Post Office trains were run only while the Queen was at Balmoral, by arrangement with the Home Office and Post Office respectively, who paid the company subsidies. They were advertised in the company's time-tables, and conveyed passengers other than those going

Railway Company (continued)—

to and from Balmoral. There was no stipulation in the contracts with the Home Office and Post Office that the trains should not stop at C.—*Held*, reversing the decision of the Court of Session, that the Queen's Messenger trains and Post Office trains were "passenger trains," and were bound by the contract. But *Held* by the EARL OF SELBORNE, L.C., LORD WATSON, and LORD FITZGERALD (*dissentiente* LORD BRAMWELL), that the contract did not apply to the special excursion trains. *Sir R. Burnett, Baronet*, v. *The Great North of Scotland Rail. Co.*, 531

—— *the railways clauses consolidation act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 90 *: grouping of rates : undue preference : action for overcharges : railway and canal traffic act*, 1854 (17 & 18 *Vict. c.* 31), *ss.* 2, 3, *and* 6]—No action can be maintained for a breach of section 2 of the Railway and Canal Traffic Act, 1854, for the word "proceeding" in section 6 of that Act includes action, and the only remedy is that given by section 3. *The Manchester, Sheffield, and Lincolnshire Rail. Co.* v. *The Denaby Main Colliery Co.* (App.), 103

By 8 & 9 Vict. c. 20. s. 90, railway companies are empowered to alter or vary the tolls fixed by their Acts, provided that all such tolls be at all times charged equally to all persons and after the same rate in respect of all passengers and of all goods or carriages of the same description and conveyed by a like carriage "passing only over the same portion of the line of railway under the same circumstances, and no reduction or advance in any such tolls shall be made either directly or indirectly in favour of or against any particular company or person":—*Held*, that this section empowers a railway company to vary its tolls within the limits set by its special Act; that the words "passing only over the same portion of the line" mean passing between the same points of departure and arrival and passing over no other part of the line; that the words "under the like circumstances" mean under like circumstances as regards the services performed by the railway company in receiving, carrying, and delivering the goods; and that the prohibition against favour shewn to any particular person is not more extensive than the equality clause which precedes it, but is confined to cases in which goods of a similar description are carried only between the same *termini* and under the same circumstances. Ibid.

A railway company charged one uniform set of rates for the carriage of goods from forty-eight different collieries to a number of places lying eastward of those collieries, so that D. whose colliery was the easternmost of these collieries was charged the same as other persons whose collieries were situated farther west and whose goods were consequently carried a greater distance:—*Held*, that this did not constitute a breach of 8 & 9 Vict. c. 20. s. 90, as the goods carried were not carried only over the same part but also over other parts of the line. Ibid.

A railway company carried coals for D. and B. under the like circumstances as regards trouble and cost to the company, and charged B. for some of such coals less than it charged D.:—*Held*, that if D. had shewn that he had sustained pecuniary loss he would have been entitled to damages; but that D. had not shewn any circumstances which would establish that the railway company was liable to him in damages for such breach of section 90. Ibid.

—— See CARRIER.

Rates. See RAILWAY; POOR.

Realty and Personalty. See REVENUE.

Receipt and Acceptance. See SALE OF GOODS.

Receiving Order. See BANKRUPTCY.

Recognisance. See CONTRACT.

Referee. See PRACTICE.

Reference. See PRACTICE.

Registrar. See BANKRUPTCY; COUNTY COURT.

Registration. See BILL OF SALE; PARLIAMENT.

Release. See ANNUITY.

Remainder. See EASEMENT.

Rent. See INCOME TAX; LANDLORD AND TENANT.

Rent-charge. See ANNUITY.

Reputed Ownership. See BANKRUPTCY; BILL OF SALE.

Restraint of Trade. See INJUNCTION.

Revenue—*income tax : life assurance : bonuses : "gains and profits" : 5 & 6 Vict. c. 35. schedule D*]—Two-thirds of the surplus of receipts over payments in respect of the life policies of an insurance company were by the terms of the policies payable every five years to the policy holders by way of cash payment, re-

Revenue (continued)—

duction of premiums, or addition to the sum assured, the remaining third being payable to the shareholders after deducting the expenses of the business:—*Held*, by BRETT, M.R., and COTTON, L.J. (LINDLEY, L.J., *dissentiente*), that such two-thirds were not "gains and profits" assessable to the income tax. *Last* v. *The London Assurance Corporation* (App.), 4

—— *inhabited house duty: exemption: caretaker: servant or other person:* 41 *Vict. c.* 15. *s.* 13, *sub-s.* 2: 44 *Vict. c.* 12. *s.* 24]—The appellant was possessed of premises which were used for business purposes only. A woman resided on the premises as caretaker, and it was a condition of her employment that her son, who was a clerk employed elsewhere, should sleep on the premises for increased safety:—*Held*, that the premises were not exempt from inhabited house duty under 41 Vict. c. 15. s. 13, sub-s. 2, and 44 Vict. c. 12. s. 24. *Weguelin* v. *Wyatt*, 308

—— *probate duty: money invested in land: order of lords justices in lunacy: conveyance to heirs and assigns: intention to consider land as personalty*]—By order of the Lords Justices of Appeal sitting in Lunacy, the accumulations of the personal estate of a lunatic were invested in the purchase of land, and conveyances were made to the use of the committees of the lunatic, their heirs and assigns, upon trust for the lunatic, his executors, administrators, and assigns; certain powers of leasing and sale were given to the committees, and declarations were inserted in each conveyance that the premises thereby granted were to all intents and purposes to be considered as part of the personal estate of the lunatic:—*Held*, that the accumulations so invested were liable to probate duty. *The Attorney-General* v. *The Marquis of Ailesbury*, 324

Reversion. See EASEMENT.

Revision. See PARLIAMENT.

Right of Way. See EASEMENT.

Royalties. See INCOME TAX.

Rule of Court. See ARBITRATION.

Salary. See BANKRUPTCY.

Sale. See CONTRACT; EXECUTION.

Sale of Goods—*contract: delivery: receipt and acceptance: statute of frauds* (29 *Car.* 2. *c.* 3), *s.* 17]—The plaintiff sold to the defendant by sample certain wheat, which was put into a barge and sent to the defendant's mill, where it arrived in the evening, and on the following morning was, by order of the defendant's foreman, taken into the mill and there examined with the sample. The defendant then rejected it as not being equal to sample. The wheat was put back into the barge and remained there for some weeks, when it was sold by order of the Court. It was not the custom at the defendant's mill to examine wheat whilst it was in the barges. In an action by the plaintiff to recover damages from the defendant for not accepting the wheat, the jury found that it was equal to sample and that the plaintiff had acted reasonably:—*Held*, that there was evidence for the jury of acceptance of the wheat sufficient to satisfy section 17 of the Statute of Frauds. *Page* v. *Morgan* (App.), 434
Kibble v. *Gough* (38 Law Times, N.S. 206) approved and followed. Ibid.

Salford Hundred Court. See PROHIBITION.

Salvage. See SHIP AND SHIPPING.

Scotland—domicil in. See PRACTICE.

Seal—contract under. See PUBLIC HEALTH.

Secretary of Company. See COMPANY.

Security for Costs. See PRACTICE.

Separation Deed. See HUSBAND AND WIFE.

Separate Estate. See BANKRUPTCY; HUSBAND AND WIFE.

Separate Use. See HUSBAND AND WIFE.

Sequestrator. See CHURCH AND CLERGY.

Service. See PRACTICE.

Set-off. See BANKRUPTCY; PRACTICE.

Settlement. See BANKRUPTCY.

Sewers—commission of: sea wall: frontager: liability to repair *rationæ tenuræ*: extraordinary storm: burden of proof: order for costs of repairs: commissioners: owners of back lands: interest in subject-matter. *Reg.* v. *The Commissioners of Sewers for the Levels of Fobbing* (M.C. 89), 401

Shareholder. See PUBLIC HEALTH.

Shares—transfer of. See BANKRUPTCY; COMPANY.

—— See COMPANY.

Shelley's Case—rule in. See WILL.

Sheriff. See EXECUTION; INTERPLEADER.

Ship and Shipping—*bill of lading: indorsement by way of security: transfer of property in goods: liability of indorsee for freight: bills of lading act* (18 & 19 *Vict. c.* 111), *s.* 1]—Where the owner of goods at sea indorsed the bill of lading in blank to secure an advance, intending that the indorsement should operate merely as a pledge, "the property in the goods did not pass" to the indorsee, within the meaning of 18 & 19 Vict. c. 111. s. 1, so as to render him liable in an action by the shipowner for the freight—*So held*, reversing the judgment of the Court of Appeal. *Sewell* v. *Burdick* (H.L.), 156

Semble (*per* LORD BLACKBURN), an assignee of a bill of lading by way of mortgage is not, as such, liable to be sued for the freight. Ibid.

Per the LORD CHANCELLOR,—The indorsee by way of security, though not having "the property" passed to him absolutely and for all purposes by the mere indorsement and delivery of the bill of lading while the goods are at sea, has a title by means of which he is enabled to take the position of full proprietor upon himself, with its corresponding burdens, if he thinks fit; and he actually does so as between himself and the shipowner if and when he claims and takes delivery of the goods by virtue of that title. Ibid.

Judgment in *The Freedom* (38 Law J. Rep. Adm. 25; Law Rep. 3 P.C. 594) observed upon. Ibid.

—— *charter-party: arrival at loading-place by a certain date: condition precedent: "excepted perils": misdirection*]—By a charter-party it was agreed that a steamer should proceed to three safe loading places between C. and M. as ordered, and proceed with cargo to H. or L. (dangers and accidents of the seas excepted). Then followed this proviso—"Should the steamer not be arrived at first loading port free of pratique and ready to load on or before a certain day, charterers have the option of cancelling or confirming this charter-party." The vessel arrived off the first loading port two days before the day named, but the sea and weather prevented any communication with the shore, and she was unable to get pratique on the day named in the charter-party, but was compelled by stress of weather to put into V., where the charterers' agent cancelled the charter-party:—*Held*, that the arrival of the steamer at the first loading place free of pratique by the day named was a condition precedent, the non-fulfilment of which entitled the charterers to exercise the option of cancelling the charter-party; and that the clause excepting dangers and accidents of the seas applied only to the voyage. *Held further*, that it is not misdirection for the Judge to tell the jury his own opinion on the issue before them. *Smith* v. *Dart & Sons*, 121

—— *charter-party: bill of lading: incorporation of terms of charter-party: inconsistent clauses: freight: lien*]—Certain goods were shipped on board the defendant's ship under a bill of lading by which they were made deliverable at the port of discharge to the plaintiffs, the consignees, the freight to be payable on delivery at the rate of 22*s.* 6*d.* per ton, and all other expenses were to be borne by the receivers, "and other conditions as per charter-party." The charter-party, which provided for payment of freight at the rate of 1*l.* 11*s.* 3*d.* per ton, contained a clause giving the shipowner "an absolute lien on the cargo for freight, dead freight, demurrage, lighterage at port of discharge, and average." There was a further clause under which the captain was to sign bills of lading at any rate of freight, "but should the total freight as per bills of lading be under the amount estimated to be earned by this charter, the captain to demand payment of any difference in advance." When the ship arrived at the port of discharge, the shipowner claimed payment of the freight specified in the charter-party, and the plaintiffs, the consignees, in order to obtain delivery of the cargo, which had been detained by the defendant under sections 193 and 194 of the Mersey Docks Acts Consolidation Act, 1858, were compelled to pay the difference between the freight specified in the bill of lading and the charter-party freight. In an action to recover the amount so paid,—*Held*, that the shipowner had no right of lien for the charter-party freight, inasmuch as the clause in the charter-party as to the payment of freight was inconsistent with the contract as to the payment of freight contained in the bill of lading, and therefore could not be incorporated into the bill of lading, and that the plaintiffs were only liable for the amount of freight specified in the bill of lading. *Gardner & Sons* v. *Trechmann* (App.), 515

—— *charter-party: time policy: insurance of chartered freight: extent and duration of risk: liability of underwriter*]—The plaintiffs were owners of a vessel which they chartered, on certain terms as regards payment of freight, for six months from the 21st of March, 1881, with the option to the charterers of extending the time for a period of three or six months. Clause 6 of the charter-party provided that in the event of loss of time by

Ship and Shipping (continued)—

collision, whereby the vessel was rendered incapable of proceeding for more than forty-eight working hours, payment of hire was to cease until such time as she was again in an efficient state to resume her voyage. On the 4th of April, 1881, the plaintiffs insured against loss of freight with the defendant "at and from and for and during the space of six calendar months, from the 15th of April to the 14th of October, 1881," defendant "to pay only loss of hire which may arise in clause 6 of charter-party for accidents occurring between the 15th of April and the 14th of October." On the 27th of June, 1881, the vessel, whilst on a voyage, struck something soft with her bottom, but was able to proceed on her voyage, and it was not until the 18th of November, when the vessel arrived at Liverpool, that it was discovered that she required considerable repairs owing to damage admittedly caused by the accident in June. The charterers, who had exercised their option of continuing the charter until the 21st of December, thereupon gave notice to the plaintiffs discontinuing the hire until the vessel was in a fit state to resume employment, which she never was until the end of December. The plaintiffs having sought to make the defendant liable under the terms of the policy for loss of hire during the charter in respect of the accident which occurred in June,—*Held*, upon the above facts, that there had been no loss of time by collision such as would justify the refusal of the charterers to pay freight; and that, even if there was, the defendant's liability was confined to loss of chartered freight between the 15th of April and the 14th of October, and could not be extended so as to include loss of hire which only occurred after the expiration of that time. *Hough & Co.* v. *Head*, 294

—— *demurrage: charter-party: construction: "such ready quay berth as ordered by charterers": failure of charterers to provide quay berth*]—A charter-party contained a clause that the plaintiffs' ship should load a complete cargo at T. and then proceed to London or Tyne Dock "to such ready quay berth as ordered by charterers," and there deliver to the affreighters or assigns; demurrage to be at the rate of 30*l.* per running day. On arrival of the ship at the Millwall Docks, London, a delay occurred by reason of there being no quay berth ready to receive her. She discharged part of the cargo into lighters, and the remainder when she got into a quay berth. The plaintiffs claimed a lien on the cargo in respect of such delay, and deposited the cargo with the dock company with notice not to deliver the same until payment of the amount claimed. The defendants, who were the owners of the cargo by virtue of certain delivery orders from the charterers or their assigns, claimed delivery of the cargo, and having paid to the company the amount claimed by the plaintiffs gave the company notice not to part with the same as they disputed the plaintiffs' lien:—*Held*, that the defendants were liable for the amount claimed, as the word "ready" was introduced into the charter-party for the protection of the plaintiffs, and that the defendants were in the same position as the charterers, who under the charter-party were bound to name a quay berth to receive the ship as soon as she was ready to proceed there. *Harris* v. *Jacobs, Marcus & Co.* (App.), 492

—— *general average: contract binding on shipowners: liability of cargo-owners to contribution: authority of master*]—A shipowner who has paid a salvage claim without action brought by the salvors may maintain an action for general average contribution against the owner of the cargo. But in such suit the fact that the shipowner had by contract made by himself or his master become bound to pay the sum actually paid is not conclusive as to the whole amount being chargeable to general average. It is a question of fact to be decided at the trial whether any, and, if any, what sum is chargeable. *Anderson, Tritton & Co.* v. *The Ocean Steamship Co.* (H.L.), 192

—— *general average: port of refuge: expense of reloading cargo*]—A vessel having suffered a particular average loss, the captain, acting properly for the safety of the common adventure, put into a port of refuge and unloaded the cargo. The vessel was then repaired, reloaded, and completed her voyage:—*Held* (affirming the decision of the Court of Appeal), that the expense of reshipping the cargo was not chargeable to general average. *Svensden* v. *Wallace Brothers* (H.L.), 497

Whether the expenses incurred for pilotage and other charges in leaving port were the subject of general average was not decided. Ibid.

—— *insurance: mutual insurance: ships insured without a stamped policy: estoppel: 30 Vict. c. 23 ss. 7 and 9: 39 Vict. c. 6. s. 2*]—Where a member of a mutual insurance company, afterwards converted into a limited company, has vessels on its books as insured, and pays calls, and otherwise acts as if he were a member of the company, he is, in any action brought against him by the limited company for calls on losses, estopped from denying his liability, and from setting up either any irregularity in the transfer from the one company to the other, or that the losses were paid without any stamped policies being entered into in contravention of 30 Vict. c. 23. s. 7. *The Barrow Mutual Ship Insurance Co. (Lim.)* v. *Ashburner* (App.), 377

Ship and Shipping (continued)—

—— *marine insurance: policy on goods: contract of sale f. o. b.: loss of goods: non-appropriation of goods at time of loss: vesting of property: insurable interest*]—The plaintiff claimed to recover from the defendant, an underwriter at Lloyd's, under a floating marine policy on goods, in respect of certain sugar lost on the 4th of February, 1881, on a voyage from Hamburg to Bristol. The sugar so lost had been shipped in performance of two contracts entered into by D. & Co. (London merchants) with the plaintiff (a merchant at Bristol) and B. & Co., as hereinafter mentioned. By the first contract, dated the 7th of January, 1881, D. & Co. agreed to sell to B. & Co. 200 tons of sugar of a certain quality, to be shipped from Hamburg to Bristol at 21*s.* 9*d.* per ton net f. o. b., and for January delivery at Hamburg, payment by cash in London in exchange for bill of lading. By the second contract, dated the 12th of January, 1881, D. & Co. agreed to sell to the plaintiff a similar quantity at a like price upon identical terms. D. & Co. were not aware until after the loss that B. & Co. had entered into the contract of the 7th of January for the purpose of enabling them to execute a contract previously made by them with the plaintiff on the same day for the sale of 200 tons of sugar at an advanced price, neither was the plaintiff aware that D. & Co. were the shippers of the 200 tons which he had contracted to take from B. & Co. The plaintiff, immediately after making the above contracts with B. & Co. and D. & Co. respectively, entered into binding contracts for the sale of the identical quantities of sugar agreed to be sold to him, and upon identical terms, except that the sale was at an advanced price which left the plaintiff a clear profit. D. & Co. advised their Hamburg forwarding agents that they had sold 400 tons of sugar for Bristol, and directed them to obtain and ship the necessary number of bags to that port, and to send the bills of lading to London as soon as possible. The whole of the sugar not having arrived at Hamburg at the time of the departure of the steamer, D. & Co's. forwarding agents at Hamburg shipped 3,900 bags only, and advised D. & Co. of this short shipment, proposing to send the 100 bags short-shipped by the next steamer. The 3,900 bags so shipped were consigned to "Order, Bristol," and the agents, in accordance with the ordinary course of business between themselves and D. & Co., duly forwarded the bills of lading indorsed in blank to certain bankers in London, who were instructed to deliver them to D. & Co. against cash payment of the amount of the invoices, being the price paid by D. & Co's. agents to the manufacturers upon delivery. No appropriation was, or indeed could be, made of any specific bags under the above contracts at the time of shipment, but the whole 3,900 bags were shipped in one undistinguished mass consigned simply "Order, Bristol." With this sugar on board, the ship left Hamburg on the 3rd of February, and on the following day went down with her cargo. Before intelligence of the loss, D. & Co. in due course took up the bills of lading, and then proceeded to apportion the 3,900 bags, appropriating 2,000 of such bags to B. & Co., and the remaining 1,900 to the plaintiff, and making out invoices accordingly, and so as to comply with the terms of each contract. The invoices were then posted by D. & Co., but prior to that time both they and the plaintiff had had intelligence of the loss of the sugar. Thereupon the plaintiff, anticipating that the 200 tons of sugar coming to him under his contract with D. & Co. might have been despatched on board the ship, although without any specific advice of such shipment, declared on the ship under his floating policy in respect of these 200 tons. Upon receipt of the invoices the plaintiff and B. & Co. respectively paid D. & Co. for the amounts named in such invoices, and obtained the bills of lading of the sugar invoiced to them under their respective contracts. Thereupon B. & Co. made out and forwarded his invoice to the plaintiff, who paid what was due from him to B. & Co., and received in return the bills of lading for the 2,000 bags so invoiced. The plaintiff then also declared upon his floating policy for this further loss:—*Held* (affirming the decision of the Court of Appeal), that the plaintiff, being bound to pay for the sugar lost or not lost, had an insurable interest which entitled him to recover on the policy. *Inglis* v. *Stock* (H.L.), 582

—— *marine insurance: reinsurance: notice of abandonment: "sue and labour" clause: "factors, servants, and assigns"*]—In order to constitute a constructive total loss as between reinsurers and reinsured, notice of abandonment need not be given by the reinsured to the reinsurers, so long as notice is given under the original policy. *Uzielli & Co.* v. *The Boston Marine Insurance Co.* (App.), 142

The ordinary "sue and labour" clause, whereby the assurers contribute in the event of the "assured, their factors, servants, and assigns," suing and labouring for the recovery of the ship, inserted in a reinsurance policy, does not enable the reinsured to recover from the reinsurers when the suing and labouring was done by the original insured. Ibid.

—— *marine insurance: risk of lighterage: concealment of arrangement between assured and lighterman*]—The plaintiffs effected with an underwriter policies of marine insurance on sugar on board certain steamers. The policies included all risks of transhipment of raft, craft, and lighters in loading and unloading. The sugar was lost while on lighters. The

Ship and Shipping (continued)—

plaintiffs had an arrangement with the lighterman that he should do all their lighterage on the terms that he was not to be liable for loss unless caused by negligence. The existence of this arrangement was not communicated to the underwriter. The plaintiffs knew that since some lightermen had thus limited their liability for loss, underwriters had charged higher rates of premium in cases in which the liability was so limited than in other cases. In an action on the policies of insurance, the jury found that the fact of the plaintiffs having such an arrangement with the lighterman was a fact which a prudent underwriter would take into consideration in estimating the premium:—*Held*, that there was evidence to justify the finding of the jury, and therefore that the defendant was entitled to judgment on the ground of the non-disclosure by the assured of a material fact. *Tate and Sons* v. *Hyslop* (App.), 592

—— *marine insurance: valued time policy: "free from particular average under three per cent.": particular losses on separate voyages, each under three per cent., amounting in the aggregate to more than three per cent.*]—In a valued time policy of marine insurance the ship and freight were warranted free from average under three per cent., unless general, or the ship be stranded, sunk, or burnt:—*Held*, that where the aggregate of the losses occurring during the whole period insured for amounted to three per cent., although the amount of the losses on each distinct voyage during the period was under three per cent., the underwriters were liable. *Stewart* v. *The Merchants' Marine Insurance Co.* (*Lim.*), 387

Blackett v. *The Royal Exchange Assurance Company* (2 Cr. & J. 244; 1 Law J. Rep. Exch. 101) followed. Ibid.

Solicitor. See BANKRUPTCY; COMPANY.

Solicitor and Client—*bankruptcy: costs: application in reference to order already made: bankruptcy rules*, 1883, *rule* 98]—The jurisdiction under rule 98 of the Bankruptcy Rules, 1883, allowing the Court "in awarding costs to direct that the costs of any matter or application shall be taxed and paid as between party and party or as between solicitor and client," must be exercised once for all at the time of making the order, and an application for costs as between solicitor and client by a creditor in proceedings in respect of which he had by previous orders obtained costs as between party and party based on the ground of meritorious services as shewn by the result of the bankruptcy cannot be entertained. *In re Angell; ex parte Shoolbred* (App.), 87

—— *charging order: garnishee summons: priority: lien: 23 & 24 Vict. c. 127. s. 28*]—The amount of the debt and costs recovered by a plaintiff in an action had been levied, and were in the hands of the sheriff, when a judgment creditor of the plaintiff took out a garnishee summons to attach this money. After the summons was taken out, but before any order was made thereon, the solicitor who had acted for the plaintiff in the action the proceeds of the judgment in which it was sought to attach, obtained under 23 & 24 Vict. c. 127. s. 28, from a Judge at chambers, an order charging in his favour the money in the hands of the sheriff. The judgment creditor applied to set this order aside:—*Held*, affirming the judgment of the Queen's Bench Division, that the charging order had priority and ought not to be set aside, that the judgment creditor who had taken out the garnishee summons was not a *bona fide* purchaser for value within 23 & 24 Vict. c. 127. s. 28, and that the word "property" in that section included both the debt and the costs recovered in the action. *Dallow* v. *Garrold. Ex parte Adams* (App.), 76

—— See PRACTICE.

Special Referee. See PRACTICE.

Stamp. See SHIP AND SHIPPING.

Statute—public and private. See WATERWORKS COMPANY.

Statutory Costs. See PRACTICE.

Stockbroker. See PRINCIPAL AND AGENT.

Stock Exchange. See PRINCIPAL AND AGENT.

Stoppage in transitu—*destination: commission agent: goods ordered to port for shipment abroad: bankruptcy of commission agent*]—Where a commission agent ordered goods, bought by him of a firm at Northampton in pursuance of instructions from his principals in Jamaica, to be sent to shipping agents at Southampton for shipment by a steamer named, with marks on the cases shewing that they were going to Jamaica as in previous transactions, it was held that the destination of the goods was Southampton, so that the vendors, on the commission agent becoming insolvent, had no right of stoppage *in transitu* upon the goods arriving in Jamaica. *Ex parte Miles; in re Isaacs* (App.), 566

Street—*expense of paring: liability of adjoining owners: local authority: towns improvement clauses act*, 1847 (10 & 11 *Vict. c.* 34), *s.* 53]—The Towns Improvement Clauses Act, 1847

Street (continued)—

(10 & 11 Vict. c. 34), enacts, in section 53, that "If any street, although a public highway at the passing of the special Act, have not theretofore been well and sufficiently paved and flagged or otherwise made good," the local authority may pave, &c., such street at the expense of the adjoining owners; and "thereafter such street shall be repaired" out of the rates. The interpretation clause enacts that "the word 'street' shall extend to and include any road, square, court, alley, and thoroughfare within the limits of the special Act." In 1857 a special Act was passed, incorporating the above provisions amongst others of 10 & 11 Vict. c. 34, and in 1864 a provisional order applied it to P. In 1875, the plaintiffs, the corporation of P., at their own expense, by agreement with the adjoining owners, widened and improved a public highway within the limits of the special Act, and gravelled, channelled, and kerbed a footpath at the side of the highway; but they did not then pave or flag it. In 1879, the plaintiffs, acting as the local sanitary authority, paved and flagged the footpath, and then sought to recover the expense of so doing from the defendants, as the owners of adjoining lands. It was found by a jury that the road in question was not in 1879 a street in the popular sense of the word, and that it had been made good in 1875:—*Held*, that the defendants were not liable, on the ground that the road had been theretofore made good, the House not deciding whether it was a "street" within the meaning of section 53. *The Mayor, &c., of Portsmouth* v. *Smith* (H.L.), 473

The word "theretofore" in section 53 means, "before the work is done by the commissioners," not "before the passing of the special Act." Ibid.

—— public. See MARKET.

—— See PUBLIC HEALTH.

Surety. See CONTRACT.

Taxation. See BANKRUPTCY; PRACTICE.

Tenancy. See FIXTURES.

Tenancy in Common—*house: repair by tenant in common: liability of co-tenant to contribution: lease by tenant in common: holding over by assignee of lease who has become co-owner*]—One tenant in common of a house is not entitled merely by virtue of his relation to his co-tenant to recover from him money expended on the repair of the house, but not for the purpose of preventing its destruction. The only remedy by which contribution may be obtained in such a case is by a partition suit, where the Court will take into account reasonable expenditure on the subject-matter of the tenancy. The assignee of a lease from a tenant in common seised of an undivided three-fourths of a house, purchased the one-fourth share of the other tenant in common, and continued in possession of the house after the expiration of the lease. A correspondence then took place between the assignee and the lessor, but without result, as to a continuance of the tenancy and the amount of rent to be paid:—*Held*, that the assignee was liable as a tenant at sufferance to pay to the lessor, by way of use and occupation, the rent reserved in the lease. *Leigh* v. *Dickeson* (App.), 18

Time. See PRACTICE.

Tort. See ACTION.

Towns Improvement Act. See STREET.

Trade—restraint of. See INJUNCTION.

Transfer. See BILL OF SALE.

Trespass—*distress: entry by raising higher a window open a few inches*]—An entry into a house for the purpose of distraining was made by raising higher the sash of a window already open a few inches:—*Held*, that the distress was legal. *Crabtree* v. *Robinson*, 544

—— See COUNTY COURT; HUSBAND AND WIFE; INTERPLEADER.

Trial at Bar. See PARLIAMENT.

—— notice of. See PRACTICE.

Trust. See BANKRUPTCY.

Trustee. See BANKRUPTCY.

Trustee and Cestui que Trust. See BANKRUPTCY.

Trust Property. See BANKRUPTCY.

Ultra Vires. See COMPANY.

Undue Preference. See RAILWAY.

Vagrant Acts—"frequenting": "with intent to commit felony": 5 Geo. 4. c. 83. s. 4: 34 & 35 Vict. c. 112. s. 15. *Reg.* v. *Clark* (M.C. 66), 370

Valuation. See ARBITRATION.

Vendor and Purchaser—*covenant running with the land: purchasers of several plots of same estate: restrictive covenants: right of purchasers to enforce inter se: effect of condition of sale precluding objection to matters not disclosed at time of sale: conveyancing and law of property act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 3, *sub-s.* 3, *and s.* 11: *deposit, return of*]—Where the same vendor selling to several persons plots of land, parts of a larger property, exacts from each of the purchasers covenants imposing restrictions on the use of the plots sold, without putting himself under any corresponding obligation, if the restrictions are merely matters of agreement between the vendor and the purchasers imposed for the vendor's own benefit, the purchasers of the several plots cannot enforce them *inter se*; but if the restrictions are meant for the common advantage of the several purchasers, such purchasers and their assigns may enforce them *inter se* for their own benefit. *The Nottingham Patent Brick Co.* v. *Butler*, 545

Whether covenants imposing restrictions upon the use of plots of land, part of a larger property, entered into with the vendor by the purchasers of the several plots are merely matters of agreement between the vendor and the several purchasers for the vendor's own benefit, or are meant to be for the common advantage of the several purchasers, is a question of fact. Ibid.

A condition of sale of land providing that the property is sold subject to any matter or thing affecting the same, whether disclosed at the time of sale or not, does not relieve the vendor from the necessity of disclosing any incumbrance or liability of which he is aware or has the means of knowledge. Ibid.

Sub-section 3 of section 3 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), merely applies to every sale the conditions therein set forth, but does not alter the effect of such conditions as established by law at the passing of the Act. Ibid.

Venue. See PRACTICE.

Vestry. See PENALTY.

Voters—revision of. See PARLIAMENT.

Wagering. See PRINCIPAL AND AGENT.

Waring, Ex parte—rule in. See BANKRUPTCY.

Waterworks Company—*distress: waterworks clauses consolidation act*, 1845: *recovery of rates: power to distrain under private act: subsequent public act*]—A private Act passed in 46 Geo. 3 gave the West Middlesex Waterworks Company power to levy a distress on default of payment by consumers of water of the water rates mutually agreed upon in accordance with 46 Geo. 3. c. cxix. s. 59. By an Act passed four years later the company was empowered to charge a reasonable amount for the water, but there was no express enactment as to the mode of recovering that amount. Subsequently to the Waterworks Clauses Consolidation Act, 1845, another private Act, 15 & 16 Vict. c. clix., was passed, in part incorporating that Act, but expressly stipulating that, "except as by this Act is expressly provided, this Act or anything therein contained shall not repeal, alter, interpret, or in any manner affect any of the provisions in force at the commencement of this Act, of the recited Acts, or any of them; and, except only so far as is requisite for the execution of this Act, all those provisions, and all powers, privileges, exemptions, and immunities of or for the benefit of any person or corporation thereby respectively created, conferred, or saved shall be and continue as valid and effectual as if this Act had not passed." The Act of 46 Geo. 3 was therein recited. The company issued its warrant of distress on the plaintiff's premises, and he brought an action for illegal distress:—*Held*, on appeal from a nonsuit by the learned Judge, that the power of the company to distrain was not taken away either inferentially by the Waterworks Clauses Consolidation Act, 1845, or expressly by the subsequent private Act incorporating that Act. *Richards* v. *The West Middlesex Waterworks Co. and Newton*, 551

—— premises occupied as a public-house: lease: premium and rent: licence: mode of fixing "annual value": statutes 10 & 11 Vict. c. 17. s. 68, and 15 & 16 Vict. c. clix. s. 31. *The West Middlesex Waterworks Company* v. *Coleman*. *Coleman* v. *The West Middlesex Waterworks Company* (M.C. 70), 343

—— water rents: "gross sum assessed to the poor rate": annual rack-rent or value: water supply for domestic purposes: premises supplied including garden. *The Bristol Waterworks Company* v. *Uren, and Uren* v. *The Bristol Waterworks Company* (M.C. 97), 480

Way—right of. See EASEMENT.

Wedding Presents. See HUSBAND AND WIFE.

Will—*construction of: advances: promissory note with interest from child: bequest to children subject to wife's interest in income and advances brought into account: interest due to wife*]—A testator, who had lent money to his son and taken a promissory note with interest, made his will, whereby he left all the

Will (continued)—

residue of his property, subject to the income being received by his wife during widowhood, to his children, with a proviso that advances to children during his lifetime, together with interest, should be taken into account in their shares:—*Held* (*dissentiente* COTTON, L.J.), that, in the absence of evidence of a contrary intention, the interest on the note was not released, and the executors of the widow were entitled to it as against the son. *Limpus* v. *Arnold* (App.), 85

—— *devise: estate tail: rule in* Shelley's Case (1 Rep. 93 *b*)]—A testatrix who died in 1820 made the following devise:—"I give and devise unto my eldest son T. all my real and freehold estate, and all leases and leasehold premises now in my possession (subject to the payment of the rents and the performance of the covenants mentioned in the said indentures of leases), during the term of his natural life, and after his decease to his legitimate child or children (if any); but if he dies without issue my will is it may go unto my other son W. during the term of his natural life, and afterwards to his legitimate child or children (if any); but if he should likewise die without issue my will is that it may go to my daughter M. and to her heirs and assigns for ever." The devise was subject to the payment of certain legacies, and there was a provision that if T. died in less than fourteen years after coming into possession of the estate and leaving no issue, the person succeeding him should repay to his "heirs, executors, or assigns" whatever he should have paid in respect of the legacies above ten pounds for every year he should have been in possession. A like provision followed for the case of T.'s "successor" dying without issue before the expiration of the remainder of the fourteen years. T. executed and enrolled a disentailing deed in 1854, and died, without ever having had issue, in 1862:—*Held* (by EARL CAIRNS, LORD BLACKBURN, and LORD FITZGERALD; *dissentientibus* EARL OF SELBORNE, L.C., and LORD BRAMWELL), that T. took an estate tail; such estate tail being (according to LORD BLACKBURN and LORD FITZGERALD) subject to joint estates for life taken by his children, if any. *Per* EARL OF SELBORNE, L.C., and LORD BRAMWELL.—T. took an estate for life with remainder to his children as purchasers in fee-simple, and remainders over in the event (which happened) of no such children coming into existence. *Bowen* v. *Lewis* (H.L.), 55

Words—"Agreement or submission in writing," 574

—— "Cause shewn," 245

—— "Clerk," 527

—— "Event," 315

—— "Fair price," 568

—— "Final judgment," 190

—— "Forthwith," 561

—— "Free from particular average under three per cent," 387

—— "Future debt or liability," 529

—— "Gains and profits," 4

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